Supreme Court, U.S.
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Nos. 03-1164 and 03-1165

In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

NEBRASKA CATTLEMEN, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX
VOL. 1

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PETITION FOR WRIT OF CERTIORARI FILED: FEB. 13, 2004
CERTIORARI GRANTED: MAY 24, 2004

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 02-2769

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ANN VENEMAN, SECRETARY OF AGRICULTURE, CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS-APPELLANTS

NEBRASKA CATTLEMEN, INC.; GARY SHARP; RALPH JONES, INTERVENORS-DEFENDANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
7/8/02	Civil Case Docketed. Dist. Ct. Office: Pierre (cyz) [02-2769]
	* * * * *
7/10/02	JUDGE ORDER: Appellants' motion for a stay of the district court's order pending appeal is granted. The appellants' motion for

DATE	PROCEEDINGS
	an expedited appeal is denied. The clerk will establish a briefing schedule in a separate order. [1537334-1] [1538260] [1537334-2] [1538260] (dlb) [02-2769]
	* * * * *
9/6/02	BRIEF FILED - Brief of Appellants - USDA, Ann Veneman and Cattlemen's Beef in 02-2769. 13,639 words w/addendum 10 copies - w/service 9/5/02 w/diskette. [02-2769] [1558939] (vla) [02-2769]
9/6/02	RECORDS received: Joint Appendix, consisting of 2 Volume(s) 3 copies for both case Nos. 02-2769 and 02-2832. [02-2769, 02-2832] (vla) [02-2769 02-2832]
9/16/02	RECORDS received: Transcript, consisting of 4 Vols. (3 vols. Trial, 1 Vol. Prelim. Injunction Hrg. Location St. Paul, MN. [02-2769, 02-2832] (jab) [02-2769 02-2832]
	* * * * *
10/8/02	BRIEF FILED - Brief of Appellees - Livestock Marketing Association, et al. in 02-2769/2832 13946 words w/addendum - 10 copies - w/service 10/7/02. w/diskette [02-2769, 02-2832] [1569205] (lmt) [02-2769 02-2832]
	* * * * *

DATE	PROCEEDINGS
10/25/02	BRIEF FILED - Reply brief - USDA, Ann Veneman, and Cattlemen's Beef in 02-2769. 6,070 words 10 copies - w/service 10/24/02 w/diskette. [02-2769] [1574999] (vla) [02-2769]
	* * * * *
3/10/03	ARGUED AND SUBMITTED IN ST. PAUL TO JUDGES Theodore McMillian, Circuit Judge, George G. Fagg, Senior Judge, James B. Loken, Circuit Judge. Douglas Letter for Appellants Cattlemen's Beef, Appellants Ann Veneman, Appellants USDA in 02-2769, John G. Roberts for Appellants Ralph Jones, Appellants Gary Sharp, Appellants NE Cattlemen in 02-2832. Philip C. Olsson for Appellees Jerry Goebel, Appellees Herman Schumacher, Appellees Pat Goggins, Appellees John Willis, Appellees Ernie J. Mertz, Appellees John L. Smith, Appellees Robert Thullner, Appellees Western Organization, Appellees Livestock Marketing in 02-2769. Rebuttal by: Douglas Letter. RECORDED. [02-2769, 02-2832] (cyz) [02-2769 02-2832]

DATE	PROCEEDINGS
7/8/03	THE COURT: James B. Loken, Theodore McMillian, George G. Fagg. OPINION FILED by Theodore McMillian, Authoring Judge PUBLISHED. [02-2769, 02-2832] [1662889] (dms) [02-2769 02-2832]
7/8/03	JUDGMENT: James B. Loken, Theodore McMillian, George G. Fagg. The judgment of the lower court is AFFIRMED in accordance with the opinion. [02-2769, 02-2832] [1662893] (dms) [02-2769 02-2832]
8/22/03	PETITION for REHEARING with petition for rehearing en banc. Filed by Appellants USDA in 02-2769, USDA in 02-2832, w/ service 8/21/03., TO COURT. [02-2769, 02-2832] (dms) [02-2769 02-2832]
8/22/03	PETITION for REHEARING with petition for rehearing en banc. Filed by Appellants Cattlemen's Beef in 02-2769, Appellants Gary Sharp in 02-2832, Appellants Ralph Jones in 02-2832 , w/service 8/21/03., TO COURT. [02-2769, 02-2832] (dms) [02-2769 02-2832]
	* * * * *
9/12/03	RESPONSE to petition for Rehearing with petition for rehearing en banc filed by USDA,

DATE	PROCEEDINGS
	USDA [1679304-1] [1686917] in 02-2769, petition for Rehearing with petition for rehearing en banc filed by Cattlemen's Beef, Gary Sharp, Ralph Jones [1679307-1] [1686917] in 02-2769, petition for Rehearing with petition for rehearing en banc filed by USDA, USDA [1679304-1] [1686917] in 02-2832, petition for Rehearing with petition for rehearing en banc filed by Cattlemen's Beef, Gary Sharp, Ralph Jones [1679307-1] [1686917] in 02-2832. Response filed by Livestock Marketing in 02-2769, Western Organization in 02-2769, Robert M. Thullner in 02-2769, John L. Smith in 02-2769, Ernie J. Mertz in 02-2769, John Willis in 02-2769, Pat Goggins in 02-2769, Herman Schumacher in 02-2769, Jerry Goebel in 02-2769, Leo Zentner in 02-2769, Livestock Marketing in 02-2832, Western Organization in 02-2832, Robert M. Thullner in 02-2832, John L. Smith in 02-2832, Ernie J. Mertz in 02-2832, John Willis in 02-2832, Pat Goggins in 02-2832, Herman Schumacher in 02-2832, Jerry Goebel in 02-2832, Leo Zentner in 02-2832. w/service 9/11/03 TO COURT. [02-2769, 02-2832] (dms) [02-2769 02-2832]
	* * * * *

DATE	PROCEEDINGS
10/16/03	JUDGE ORDER: The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Murphy and Judge Melloy would grant the petition for rehearing en banc. Judge Wollman did not participate in the consideration or decision of this matter. - Published Order [1679304-1] [02-2769, 02-2832] [1697444] [1679307-1] [02-2769, 02-2832] [1697444] (dms) [02-2769 02-2832]
10/17/03	MOTION of aplnt, USDA in 02-2769, Ann Veneman in 02-2769, Cattlemen's Beef in 02-2769, NE Cattlemen in 02-2832, Gary Sharp in 02-2832, Ralph Jones in 02-2832, to stay mandate. [02-2769, 02-2832] [1697777], TO COURT. w/service 10/17/03 (dms) [02-2769 02-2832]
	* * * * *
10/29/03	JUDGE ORDER: granting appellant motion to stay mandate [1697777-1] [02-2769, 02-2832] [1702013] in 02-2769, 02-2832 (paw) [02-2769 02-2832]
	* * * * *

DATE	PROCEEDINGS
1/14/04	MOTION of aplnt, USDA in 02-2769, Ann Veneman in 02-2769, Cattlemen's Beef in 02-2769, USDA in 02-2832, Ann Veneman in 02-2832, Cattlemen's Beef in 02-2832, NE Cattlemen in 02-2832, Gary Sharp in 02-2832, Ralph Jones in 02-2832, to stay mandate. [02-2769, 02-2832] [1726630], TO COURT. w/ service 1/13/04 (dms) [02-2769 02-2832]
	* * * * *
3/19/04	JUDGE ORDER: Granting appellant's motion for an extension of the stay of mandate until final disposition in the Supreme Court. [1726630-1] [02-2769, 02-2832] [1748396] in 02-2769, 02-2832 (dms) [02-2769 02-2832]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/29/00	5	DECLARATION of Nancy Robinson (sn)
12/29/00	6	AFFIDAVIT of Ronald A. Parsons, Jr. (attachment not scanned) (sn)
		* * * * *
01/04/01	7	DECLARATION of Robert M. Thullner (sn)

DATE	DOCKET NUMBER	PROCEEDINGS
01/05/01	8	DECLARATION of John L. Smith (jb)
		* * * * *
02/23/01	37	MEMORANDUM OPINION AND ORDER by Charles B. Kornmann granting motion for preliminary injunction [16-1], granting motion for Preliminary Injunction [3-1] (cc: all counsel) (jb)
		* * * * *
08/03/01	79	THIRD AMENDED COMPLAINT For Declaratory and Injunctive Relief by plaintiff Ernie J. Mertz, plaintiff John L. Smith, plaintiff Robert M. Thullner, plaintiff Western Organization, plaintiff Livestock Marketing; adding John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, Leo Zentner (jb)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
09/21/01	82	ANSWER TO THIRD AMENDED COMPLAINT by intervenor defendant Nebraska Cattlemen, intervenor defendant Gary Sharp, intervenor defendant Ralph Jones to [79-1] (dc)
		* * * * *
10/19/01	104	JOINT STATEMENT of Stipulated Facts by defendant Cattlemen's Beef, defendant US Dept of Agric, defendant Ann Veneman (attachments not scanned) (in expando) (dc)
		* * * * *
10/22/01	108	FOURTH AFFIDAVIT of Counsel With Attached Plaintiffs' Exhibits Nos. 47-61 (Exhibits not scanned) (in expando) (jb)
10/22/01	109	AFFIDAVIT of Daniel A. Sumner (jb)

DATE	DOCKET NUMBER	PROCEEDINGS
10/22/01	110	DECLARATION of Robert M. Thullner (jb)
10/22/01	111	DECLARATION of John L. Smith (jb)
10/22/01	112	DECLARATION of Ernie J. Mertz (jb)
10/22/01	113	DECLARATION of John Willis (jb)
10/22/01	114	DECLARATION of Pat Goggins (jb)
10/22/01	115	DECLARATION of Herman Schumacher (jb)
10/22/01	116	DECLARATION of Jerry Goebel (jb)
10/22/01	117	DECLARATION of Leo Zentner (jb)
10/22/01	118	DECLARATION of Pat Goggins on behalf of the Livestock Marketing Association (jb)
10/22/01	119	DECLARATION of John D. Smillie on behalf of the Western Organization of Resource Councils (jb) (Entered: 10/22/2001)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/28/01	153	PRE-TRIAL WITNESS AND EXHIBIT DESIGNATION submitted by plaintiff Ernie J. Mertz, plaintiff John L. Smith, plaintiff Robert M. Thullner, plaintiff Western Organization, plaintiff Livestock Marketing (sn)
		* * * * *
01/15/02	165	EXHIBIT LIST by plaintiffs (kh) [Entry date - 01/16/02]
01/15/02	166	EXHIBIT LIST by defendants (kh) [Entry date - 01/16/02]
01/15/02	167	EXHIBIT LIST by intervenor defendants (kh) [Entry date - 1/16/02]
		* * * * *
01/24/02	169	THIRD SUPPLEMENTAL DECLARATION of Barry Carpenter (attachments not scanned) (dc)

DATE	DOCKET NUMBER	PROCEEDINGS
01/24/02	170	DECLARATION of Thomas Ramey (attachments not scanned) (dc)
01/31/02	171	TRANSCRIPT of Court Trial held on 1/14/02 Volumes I, II & III (in expando) (jb)
		* * * * *
06/21/02	174	MEMORANDUM OPINION AND ORDER re: plaintiff's request in the seventh cause of action of their third amended complaint for declaratory and injunctive relief is granted; The Beef Promotion and Research Act and the Beef Order promulgated thereunder, which mandate the payment of an assessment by cattle producers, importers, and others who sell beef subject to the terms of the Act, are unconsitutional and unenforceable; the defendants are hereby enjoined and restrained from any further collection of beef checkoffs as of the start of

DATE	DOCKET NUMBER	PROCEEDINGS
		business on July 15, 2002; attorney fees, sales tax and costs shall be awarded to plaintiffs; the defendants are permanently enjoined and restrained from any further use of checkoff funds by Judge Charles B. Kornmann (cc: all counsel) (jb) [Entry date 06/24/02] [Edit date 06/24/02]
06/21/02	175	JUDGMENT in favor of Ernie J. Mertz, John L. Smith, Robert M. Thullner, Western Organization, Livestock Marketing, John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, Leo Zentner and against Cattlemen's Beef, US Dept of Agric, Ann Veneman by Judge Charles B. Kornmann ; (cc: all counsel) (jb)
07/03/02	176	NOTICE OF APPEAL by defendant Cattlemen's Beef, defendant US Dept of Agric, defendant Ann Veneman from [174-1] , Appeal fee wv (cc: all counsel, Court Reporter) (jb)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
07/15/02	182	NOTICE OF APPEAL by intervenor defendant Nebraska Cattlemen, intervenor defendant Gary Sharp, intervenor defendant Ralph Jones from Judgment [175-1] , Appeal fee pd (cc: all counsel, Court Reporter) (sn) (Entered: 07/15/2002)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL., INTERVENOR-DEFENDANTS

PLAINTIFFS' THIRD AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NATURE OF THE CASE

1. This is an action for declaratory and injunctive relief arising from the failure of the U.S. Department of Agriculture ("USDA") and the Secretary of Agriculture ("the Secretary") to provide diligent oversight and implementation of the referendum provisions of the Beef Research and Promotion Act. 7 U.S.C. § 2906. Plaintiff Livestock Marketing Association ("LMA") submitted to USDA petitions signed by the individual plaintiffs in this action and by more than 140,000 other cattlemen seeking a referendum on the Beef Promotion and Research Order. The failure of USDA and the Secretary to act upon the petitions violates statutory

and constitutional requirements. In addition, this action challenges the constitutionality of the Beef Research and Promotion Act of 1985, 7 U.S.C. §§ 2901-11 in light of the Supreme Court's recent decision in *United States* v. *United Foods, Inc.*, 121 S. Ct. 2334 (2001).

JURISDICTION AND VENUE

2. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1361, 2201, and 2202, and by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

3. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e).

THE PARTIES

4. Plaintiff Robert M. Thullner, 10589 US Hwy 83, Herried, South Dakota 57632, is an individual who raises cattle, signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

5. Plaintiff John L. Smith, Box 336, Fort Pierre, South Dakota 57532, is an individual who raises cattle, signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order and resides in this judicial district.

6. Plaintiff Ernie J. Mertz, 32028 132 Street, Bowdle, South Dakota 57428, is an individual who raises cattle, signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

7. Plaintiff John Willis, P.O. Box 354, Lake City, Florida, 32056-0354, is an individual who has a small cow-calf operation and pays the mandatory assessments

imposed by the Beef Research and Production Act. He is the Chairman of the Board of the Livestock Marketing Association and the owner of the Columbia Livestock Market of Lake City, Inc. in Lake City, Florida.

8. Plaintiff Pat Goggins, P.O. Box 1781, Billings, Montana, 59103, is an Angus breeder, cow/calf operator, and cattle feeder. He estimates that he pays approximately $30,000 annually in beef checkoff assessments. He is the President of the Livestock Marketing Association and owner of Public Auction Yards in Billings, Montana.

9. Plaintiff Herman Schumacher, P.O. Box 67, Herreid, South Dakota 57632-0067, owns a feedyard in South Dakota and pays the mandatory beef checkoff assessments. He also owns Herried Livestock Market, Inc. in Herreid, South Dakota.

10. Plaintiff Jerry Goebel, RRI, Box 46A, Lebanon, SD, is a cattle producer as defined by the Act. He is a resident of South Dakota. Mr. Goebel did not receive the PwC mail survey, but did receive a telephone call from a PwC representative on or about January 11 or 12, 2001. He responded to their request for financial information on January 23, 2001.

11. Plaintiff Leo Zentner, 9602 Alexander Road, Shepherd, Montana, 59079, is a cattle producer as defined by the Act. He is a resident of Montana. Mr. Zentner received a telephone call from PwC on January 4th or 5th, 2001. He then received a PwC mail survey on approximately January 12, 2001. He sent the requested financial information on January 16, 2001.

12. Plaintiff Livestock Marketing Association, 7509 Tiffany Springs Parkway, Kansas City, MO 64153-2315,

is a trade association representing livestock marketing businesses, which was established in 1947 as the National Livestock Auction Association. It is incorporated as a not-for-profit organization in the State of Missouri, and its members are persons engaged in operating livestock markets, who regularly engage in the purchase of cattle. The Livestock Marketing Association currently represents more than 800 livestock marketing businesses in the United States, including auction markets, commission firms, dealers, and order buyers. Approximately 90 percent of LMA members are market operator and dealers who also have cattle production operations and therefore are subject to and pay as well as collect the mandatory beef checkoff assessments.

13. Plaintiff Western Organization of Resource Councils ("WORC"), 2401 Montana Avenue, #301; Billings, Montana 59101, is an association of grassroots organizations which, in turn, are composed of affiliated citizens' groups based in 42 communities throughout the region. Members of WORC include the Dakota Resource Council (North Dakota), Dakota Rural Action (South Dakota), the Idaho Rural Council (Idaho), the Northern Plains Resource Council (Montana), the Powder River Basin Resource Council (Wyoming) and the Western Colorado Congress (Colorado). The members of these groups are farmers, ranchers, small business and working people who seek to protect natural resources, family farms, and rural communities, including cattle producers who are subject to and pay the mandatory beef checkoff assessments.

14. The United States Department of Agriculture, Defendant, is an agency of the United States government.

15. Defendant Ann Veneman is the Secretary of Agriculture (the Secretary), and is sued in her official capacity. The Secretary is charged with administering the Beef Promotion and Research (the "Act" or the "Beef Promotion Act"), 7 U.S.C. §§ 2901-11, which establishes beef promotion program, funded through per-head assessments on Cattle producers and which gives cattle producers who are subject to the Act the right to request that the Secretary hold a referendum in order to determine where the program should be continued.

16. Defendant Cattlemen's Beef Promotion and Research Board (herein, and popularly, referred to as the "Cattlemen's Beef Board") is an organization authorized pursuant to the Beef Promotion and Research Act, 7 U.S.C. § 2904(1), and created pursuant to the Beef Promotion and Research Order. It is composed of cattle producers and importers, who are appointed by the Secretary and charged with administering the Beef Promotion and Research Order at the federal level.

BACKGROUND

Statutory and Regulatory Scheme

17. The Beef Promotion and Research Act, 7 U.S.C. §§ 2901-11, originally enacted in 1976, is intended to strengthen the beef industry's position in the marketplace through a coordinated program of promotion and research. 7 U.S.C. §§ 2901(b).

18. The Beef Promotion and Research Program is funded by mandatory producer contributions. Currently, there are a number of other producer funded promotion and research programs for agricultural

commodities, identical in many of their functional respects to the Beef Promotion Act.

19. The Beef Promotion Act directs the Secretary of Agriculture to promulgate a Beef Promotion and Research order to be financed through one dollar per head assessments and which must be paid by all cattle producers and importers. 7 U.S.C. § 2904(8)(C). Each person receiving a payment from a producer is designated a "collecting person" 7 C.F.R. § 1260.311(a), and is required to remit the assessments either to a qualified State beef council or directly to the Cattlemen's Beef Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. §§ 1260.172(a)(5), 1260.311(a), 1260.312(c).

20. The Beef Promotion and Research Act provides for the formation of a Cattlemen's Beef Board (CBB), which is a large committee of competitors of the individual plaintiffs. Members of the CBB are nominated by state cattle associations. The CBB has 110 members, consisting jointly of both domestic cattle producers and importers of foreign beef and cattle.

21. The CBB is a non-governmental entity which purports and holds itself out to be an entity representative of one segment of the population with certain common interests, namely cattle producers.

22. Members of the CBB and the Operating Committee are not government officials, but rather, individuals from the private sector.

23. The pool of nominees from which CBB members are selected are determined by private beef industry organizations from various states.

24. The private beef industry organizations eligible to participate in CBB nominations are those that "have a history of stability and permanency," and whose "pri-

mary or overriding purpose is to promote the economic welfare of cattle producers." 7 U.S.C. § 2905(b)(3) & (4).

25. Plans and projects "of promotion and advertising, research, consumer information, and industry information . . . paid for with assessments collected by the Board" are developed by the Beef Promotion Operating Committee (BPOC), composed of 10 members elected by the CBB from its own membership and "10 producers elected by a federation that includes as members the qualified State beef councils." That "federation" is the Checkoff Division of NCBA. 7 U.S.C. 2904(4)(A).

26. The Cattlemen's Beef Board and the Beef Promotion Operating Committee, including all of their activities pursuant to the Beef Promotion and Research Act and all of their staff, are funded entirely by mandatory assessments and involve no appropriated government funds.

27. The National Cattlemen's Beef Association (NCBA), a private trade association, enjoys a virtual monopoly of the CBB's contracts "for implementing and carrying out the activities authorized by the [Act.] . . . including . . . programs of promotion, research, consumer information and industry information." 7 U.S.C. § 2904(6). The CBB and NCBA operate in close conjunction with one another, are housed in the same building, and host virtually seamless interlocking Internet websites.

28. Funds for the promotion and advertising programs developed by the CBB, BOC, and NCBA are generated by levying a mandatory, one dollar per head

assessment on every sale of cattle in the United States. 7 U.S.C. § 2904(8)(C).

29. Under the terms of the Act, the first twenty-two months after an Order is, in effect, a "trial period." Within that 22-month period, the Secretary is required to conduct a referendum among persons who were producers and importers during the trial period to determine whether the persons subject to the Order felt that it should continue in effect. 7 U.S.C. § 2906(a).

30. The Secretary issued an Order on July 18, 1986, 51 Fed. Reg. 26132; the required referendum was conducted on May 10, 1988; the Order was approved and assessments subsequently became mandatory.

31. The only way that the Order may now by suspended or terminated is by a new referendum "on the request of a representative group comprising ten per centum or more" of the cattle producers subject to the order. 7 U.S.C. § 2906(b).

32. Amendments to the Act in 1985 deleted the Secretary's previously existing unilateral powers either to terminate the Order or to call a referendum on his or her own initiative.

33. Amendments to the Act in 1985 deleted and repealed the separability provision, which had provided that if any provision or application of the Act to any person or circumstance where held invalid, the validity of the remainder of the Act would not be affected thereby.

34. The Beef Promotion and Research Act deals only with the advertising, promotion, and research of beef. The Act does not regulate the beef industry, nor does it purport to regulate the beef industry. The Act does not regulate price, size, pack, maturity, production levels,

quotas, reserves, or any other matters designed to restrict competition and/or stabilize markets or prices. Rather, the Beef Promotion and Research Act exists only for the purpose of compelling producers who sell cattle to fund the advertising and promotional activities of the CBB of generic beef.

35. The cattle production industry is a free market industry governed by supply and demand.

36. Most monies raised by the assessments under the Beef Promotion and Research Act are spent for generic advertising and generic promotion.

Factual Background

37. Cattle are produced throughout the United States. USDA has estimated that approximately 1.07 million of the 1.9 million Americans engaged in the agricultural industry produce cattle. The cattle industry is the single largest sector of the agricultural industry, generating approximately $30 billion annually for the United States economy.

38. United States beef cattle are generally raised and grazed on ranches and finished to market weight on mixed grain rations in feedlots.

39. Cattle which have been fed mixed rations and feed grains represent the largest sector of cattle production and slaughter in the United States. Ranchers raising grain-fed cattle typically sell their feeder calves to feedlots and their mature cows and bulls to slaughter plants through auction markets and by private treaty sales. Grain-fed cattle are typically slaughtered and their meat sold as fresh subprimals, such as rounds, chucks, and loins to retailers, where it is sold to consumers as roasts and steaks very often with grades of USDA prime, USDA choice, and USDA select.

40. Cattle for slaughter are also produced as a "byproduct" by dairy farmers. Dairy producers will typically "cull" their herds of these cattle, both to reduce production when milk prices are low and to remove older cows from milk production. In addition, many of the offspring of milk cows are sold. These "cull cows" are typically marketed through auction marketed through auction markets to cow slaughter plants. Beef from on-grain-fed cattle, such as cattle produced as byproducts of dairy production, is generally less tender, and therefore better suited for making ground beef and further processed beef products.

41. A significant amount of beef sold in the United States is imported, rather than originating from fed cattle raised, sold, and processed in the United States. Much of this imported beef comes from cattle which are grass-fed and not grain-fed, and comes from herds and breeds which produce a substantially lesser quality of beef than United States cattle.

42. The individual plaintiffs, the large majority of members of LMA, and the large majority of members of the member organizations of WORC are United States ranchers and cattle producers, primarily with cow-calf operations, who raise calves to a weight where they are sold through auction markets to either stockers or feeders. They produce United States, grain-fed cattle, to be sold as United States beef.

43. The individual plaintiffs, the large majority of members of LMA, and the large majority of members of the member organizations of WORC are cattle producers who are subject to the mandatory assessments of the Beef Promotion and Research Act and who have paid the mandatory one-dollar per head beef checkoff assessment for all of the cattle that they have sold since

the inception of the Act. The members of the LMA also collect these assessments at their livestock auctions, at which cattle producers sell their cattle.

44. In the 15 years since the enactment of the 1985 amendments to the Beef Promotion and Research Act, more than $1 billion has been expended from assessments on cattle producers, but beef demand has decreased overall.

45. In the 15 years since the enactment of the 1985 amendments to the Beef Promotion and Research Act, the gap between cattle prices received by cattle producers and retail beef prices has widened at an accelerated rate. The cattle producer's share of the beef retail dollar has fallen from approximately 70 percent in the 1970s to below 50 percent in 1996.

46. Beef packers, beef processors, beef marketers, beef wholesalers, and beef retailers are not subject to the mandatory assessments of the Beef Promotion and Research Act, even though they are in the best position to directly profit or gain advantage from any alleged benefits of the promotion advertising, and other activities funded by the mandatory assessments on cattle products.

47. Most, if not all, of the promotional programs supported by the mandatory beef checkoff assessments are "generic," in the sense that they do not recognize the distinguishing characteristics and qualitative differences between United States and imported beef, or grain-fed and non-grain-fed beef.

48. The generic promotion and advertising programs of the Beef Promotion and Research Order have had no discernable effect on the consumption of beef in the United States.

49. During 1997 and 1998, livestock markets found themselves deducting assessments from prices which were already not sufficient to cover producer costs. Producers expressed extraordinary frustration regarding these assessments at livestock markets.

50. As a service to their customer-cattlemen, LMA and its members decided to initiate a petition drive to obtain a referendum on continuation of the program. LMA undertook this action to provide producers throughout the United States with an opportunity to have input into the decision as to whether the program should be continued, terminated or revised.

51. Beginning in 1997, LMA members directed the association to explore the appropriate procedures for submitting petitions seeking a referendum. In 1997 and early 1998 LMA made inquiries to the Secretary concerning the petition process for a beef referendum. In March, 1998, USDA provided LMA with a list of current requirements and sample language for the petition, which LMA adopted in its entirety. USDA further stated that the petition must contain a signature, the date of each signature, the printed name of the signer, the signer's company name (if applicable), the signer's full address, and the signer's telephone number.

52. In April 1998, USDA further advised LMA that initiation of a referendum would require: (1) the verification of 116,791 valid signatures; (2) the determination that the persons who signed the petition are "a representative group of cattle producers," and (3) a decision by the Secretary to conduct the requested referendum.

53. LMA began collecting petition signatures in July, 1998. LMA and its members were supported in

this effort by other organizations including the National Farmers Union and the Western Organization of Resource Councils. The petition drive lasted until September 31, 1999, and LMA collected, in total, 145,045 signatures, all of which were submitted to the Secretary on November 12, 1999. Because USDA specified that the necessary number of signatures would have to be collected within a single continuous 12-month period, LMA designated 125,788 signatures collected in the period between September 1, 1998 and August 31, 1999 as being from the qualifying twelve-month period.

54. By the time LMA submitted the petitions, the total number of cattlemen in the country had declined by approximately eight percent so that ultimately only 107,883 signatures were required, to meet the qualifying 10 percent requirement.

55. Support for the referendum was particularly strong in South Dakota. Of the 18,700 beef and dairy producers in the state, 8,545, or more than 45 percent, signed petitions seeking a referendum.

56. Beginning in mid-1998, the Cattlemen's Beef Board and its principal contractor, the National Cattlemen's Beef Association, initiated a vastly expanded program of "producer communications." These communications were clearly designed to persuade producers against signing petitions and to promote a "no" vote on any referendum.

57. Both LMA and WORC wrote to USDA in April, 1999, protesting "producer communications" expenditures, which had increased from $850,000 in Fiscal Year 1996 and $653,591 in Fiscal Year 1997 to $3,748,604 in Fiscal Year 1998, $1,135,000 in Fiscal Year 1999 and

$3,295,073 in Fiscal Year 2000. Including the budget of $1,870,000 for FY 2001, which is just beginning, the Cattlemen's Beef Board has thus allocated a total of $10,048,677 for producer communications since 1998.

58. These "producer communications" funds have been directed to promoting the program back to the producers who pay the mandatory $1 per head checkoff.

59. The petitions submitted by LMA were already in a Microsoft database format when they were provided to USDA on November 12, 1999. USDA did not proceed to review the database until April, 2000, and it was not completed until September, 2000. Thus, almost ten months elapsed before the agency completed even its first step in verifying signatures and producer status.

60. Although cattle producers have been making mandatory check-off contributions since 1986, USDA apparently does not have any way of identifying the cattlemen who have contributed to the program. USDA contracted with a private accounting firm, PricewaterhouseCoopers, to contact a statistical sample of beef petition signers by mail to confirm individual signatures and obtain sales documents, with a contract completion date of mid-January, 2001. PricewaterhouseCoopers sent survey forms to referendum petitioners, asking for this information. The forms sent did not bear a control number assigned by the Office of Management and Budget.

61. In 1997 and 1998, when LMA representatives met and exchanged correspondence with USDA officials about the information that would be provided by each petitioner, they were never told, then or later, that individual petitioners would need to provide personal sales documents at all, nor that these sales

documents would have to be from exactly the same time period as that set for signing petitions.

62. On February 5, 2001, PricewaterhouseCoopers issued a report concluding that there were not sufficient valid signatures to trigger a referendum, upon which the USDA has relied in denying a referendum.

63. The Plaintiffs have suffered past injury and harm, and face the threat of ongoing and future injury and harm as the result of the actions of the Defendants.

Legal and Procedural Background

64. Plaintiffs initially filed their complaint seeking declaratory and injunctive relief.

65. Plaintiffs previously sought and obtained a preliminary injunction against certain producer communications funded by mandatory assessments under the Beef Promotion and Research Order.

66. The United States Supreme Court subsequently released its decision in *United States v. United Foods, Inc.*, 121 S. Ct. 2334 (2001) which held that the assessments under the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.* violated the First Amendment to the United States Constitution.

67. At the oral argument before the United States Supreme Court, the Assistant to the Solicitor General, Barbara McDowell, Esq., asserted that the beef program "is very much like the mushroom program."

68. The Court then invited the parties to address the impact of the *United Foods* decision on the present case.

69. The parties responded to the Court in a joint statement informing the Court that "The parties are in agreement that the issue regarding the constitutionality of the beef checkoff program called into question by the Supreme Court's recent decision in *United Foods* needs to be resolved prior to proceeding with Plaintiffs' claims related to the LMA's petition drive and the validation process conducted by USDA and PwC."

70. The Plaintiffs were then granted permission to file this amended complaint.

71. The present case is governed by the *United Foods* decision.

72. The mandated assessments under the Beef Promotion and Research Act are not ancillary to a more comprehensive program restricting marketing autonomy. To the contrary, the advertising and promotion of beef, far from being ancillary, is the principal object of the regulatory scheme.

73. Unlike California tree fruits, the beef industry is identical to the mushroom industry in that beef is not marketed under detailed marketing orders that have displaced competition to such an extent that they had an antitrust exemption.

74. The beef industry is characterized by a free market and the aggregate consequences of independent competitive choices of cattle producers, and is not characterized by collective action in any sense.

75. Cattle producers are not bound together and required by statute to market their products according to cooperative rules. Their freedom to market independently is not constrained by any regulatory scheme

and they are not part of any broader collective enterprise.

76. Almost all of the funds collected under the Beef Promotion and Research Order are used for generic advertising and promotion.

77. Beyond the collection and disbursement of advertising and promotion funds, there are no marketing orders regulating beef production and sales, no exemption from antitrust laws, and nothing preventing individual producers from making their own marketing decisions.

78. Cattle producers are not forced to associate as a group that makes cooperative marketing decisions.

79. Cattle production is unregulated, except for the enforcement of mandatory assessments used for beef promotion and research.

80. The cattle production industry has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply.

81. The Beef Promotion and Research Act does not require group marketing action among cattle producers, save to generate the very speech to which the plaintiffs object through advertising and promotion funded by the mandatory assessments.

FIRST CAUSE OF ACTION

82. The Plaintiffs reiterate and incorporate by reference paragraphs 1-81 hereof.

83. The USDA Defendants' delays in handling Plaintiffs' petitions constitute unreasonable delay, in violation of sections 555 and 706(2) of the Administrative Procedure Act.

SECOND CAUSE OF ACTION

84. The plaintiffs reiterate and incorporate by reference paragraphs 1-83 hereof.

85. The Secretary's "validation" program is seriously flawed and denied Plaintiffs their rights to due process and equal protection of the law.

THIRD CAUSE OF ACTION

86. The plaintiffs reiterate and incorporate by reference paragraphs 1-85 hereof.

87. The Cattlemen's Beef Board's producer communications activities violate both the Beef Promotion and Research Act and the First Amendment by using checkoff funds for "producer communications" to disseminate public relations and political messages, including anti-referendum messages supporting the beef checkoff.

FOURTH CAUSE OF ACTION

88. The plaintiffs reiterate and incorporate reference paragraphs 1-87 hereof.

89. The deletion of extensive portions of the Beef Promotion and Research Act, when it was amended in 1985, eliminated the Secretary's ability to terminate the Order on his own initiative or to call a referendum on his own initiative, and eliminated the presumption that the Secretary would call a referendum in response to a petition from ten percent of the producers. The result of these changes was to cause an unconstitutional delegation of legislative authority to the Cattlemen's Beef Board.

FIFTH CAUSE OF ACTION

90. The plaintiffs reiterate and incorporate by reference paragraphs 1-89 hereof.

91. The termination and referendum provisions of the Beef Promotion Act provide far less protection against the continuation of an abusive and/or ineffective program than are provided with respect to similar promotional programs, and therefore violate the rights of cattle producers to equal protection under the Fifth Amendment to the United States Constitution.

SIXTH CAUSE OF ACTION

92. The plaintiffs reiterate and incorporate by reference paragraphs 1-91 hereof.

93. In implementing the validation program the Secretary has failed to comply with the requirements of the Paperwork Reduction Act of 1995.

SEVENTH CAUSE OF ACTION

94. The plaintiffs reiterate and incorporate by reference paragraphs 1-93 thereof.

95. Under the First Amendment to the United States Constitution, the CBB may not underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the ideas being advanced.

96. The plaintiffs oppose the general content of the promotion, advertising, and other activities funded by the mandatory assessments which they are compelled to pay.

97. Plaintiffs want to convey the message that United States cattle and beef are superior to imported beef and object to being charged for a contrary

message, one which promotes beef as a generic commodity.

98. Plaintiffs object to the use of mandatory assessments against them for the generic promotion and advertising of beef, as opposed to United States beef in particular, which they believe to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality. Plaintiffs object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle. Plaintiffs object to the association of beef from United States fed cattle with beef from imported cattle.

99. Importers of foreign beef are subject to the equivalent of a one dollar per head mandatory assessments under the Beef Promotion and Research Act and co-fund the beef checkoff and its advertising and promotion efforts along with United States fed cattle producers.

100. Plaintiffs believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase, if anything, the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers. Plaintiffs object to the messages conveyed and object to financing advertising for the benefit of their competitors.

101. Plaintiffs object to the use of mandatory assessments against them for the generic promotion and advertising of beef, as opposed to fed beef or grain-fed

beef, which they believe to be superior. This is also a message that they wise to convey. They object to being charged for a contrary message.

102. Plaintiffs object to the use of mandatory assessments against them for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. The object to being charged for a message which they do not support. They object to being compelled to pay assessments for speech with which they disagree, and which does not benefit them, but instead benefits those who are not subject to the assessments.

103. Certain of the plaintiffs object to the use of mandatory assessments against them for the promotion and advertising of generic beef, as opposed to specific breeds or brands of beef, such as certified Angus or Hereford, which they believe to be superior types of beef. They object to being charged for a contrary message.

104. Plaintiffs object to the advertising and promotional activities funded by the mandatory assessments against them because they are ineffectual. They object to being charged for a message which they do not support.

105. Plaintiffs object to the advertising and promotional activities funded by the mandatory assessments against them because the beef packers, beef processors, and beef retailers who are in the best position to recoup any alleged benefits of those activities are "free riders" who do not share in the cost. They object to being charged for a message which they do not support.

106. Plaintiffs object to various other specific messages that appear in advertisements promotional messages and other programs funded by the mandatory assessments against them, including but not limited to, those messages against which a preliminary injunction has been entered by this Court. They object to being charged for messages with which they disagree or do not support.

107. The Beef Promotion and Research Act does not serve a legitimate government interest.

108. Plaintiffs object to being compelled to express certain views and to being compelled to pay subsidies for speech to which they object. Yet they are forced to do so by law under the Beef Research and Promotion Act. This is an obligation imposed by law making membership in the group forced to pay assessments and fund objectionable speech less than voluntary.

109. Essentially the only program or purpose that these mandatory assessments serve is the advertising and promotion scheme to which the plaintiffs object.

110. The expressions the plaintiffs are required to support are not germane to any purpose independent of the compelled speech itself.

111. The assessments are not necessary to make any voluntary advertisements non-misleading for consumers.

112. The Beef Promotion and Research Act violates Plaintiffs' right to freedom of speech under the First Amendment to the United States Constitution in that the Beef Promotion and Research Order wrongfully compels Plaintiffs to fund the speech of the Cattlemen's Beef Board. This speech is objectionable to Plaintiffs. This speech is contrary to the interests of Plaintiffs.

This speech neither serves nor is ancillary to any legitimate economic or governmental purpose.

EIGHTH CAUSE OF ACTION

113. The plaintiff reiterate and incorporate by reference paragraphs 1-112 thereof.

114. The Plaintiffs object to association with the National Cattlemen's Beef Association, a private trade organization which is the principal contractor for the CBB and which controls, administers, and oversees most if not all of the beef research projects funded by the mandatory assessments collected under the Beef Promotion and Research Order.

115. The National Cattleman's Beef Association is a private trade association with only 40,000 individual members. The Plaintiffs object to many of the policies, positions, and programs advocated by this private trade association, including those designed to promote the generic consumption of beef as opposed to specifically beef from United States fed cattle. The Plaintiffs object to being compelled to fund that organization and the research projects selected by that organization. The Plaintiffs object to being compelled to associate with that organization through the research funded by the mandatory assessments collected under the Beef Promotion and Research Order.

116. The Beef Promotion and Research Act violates Plaintiffs' right to freedom of association under the First Amendment to the United States Constitution in that the Beef Promotion and Research Order wrongfully compels Plaintiffs to associate with the National Cattlemen's Beef Association, the Cattleman's Beef Board, and entities which import beef which is not United States fed cattle beef.

PRAYER FOR RELIEF

For the aforementioned reasons, Plaintiffs respectfully request that the Court grant a Declaratory Judgment declaring (a) that the Beef Promotion and Research Act and Beef Promotion and Research Order violate the plaintiffs' constitutionally guaranteed rights to freedom of speech and freedom of association under the First Amendment to the United States Constitution and plaintiffs' constitutionally guaranteed right to equal protection under the Fifth Amendment to the United States Constitution; and (b) that the Secretary cannot constitutionally collect assessments pursuant to that Act, and further request that the Court grant Plaintiffs a preliminary and permanent injunction prohibiting the United States Department of Agriculture or the Cattlemen's Beef Board from enforcing or collecting any assessments under Beef Promotion and Research Act or Beef Promotion and Research Order.

In the alternative, the Plaintiffs respectfully request that the Court enter a Preliminary and Permanent Injunction, ordering (a) the USDA Defendants to immediately proceed to scheduling a referendum on the termination of the Beef Research and Promotion Order, and (b) the Cattlemen's Beef Board to immediately cease its expenditures for "producer communications" and to advise the Court how it will make restitution to producers for the $10,048,677 illegally expended on such communications since 1998, and how it will provide to the Plaintiffs funding for corrective communications to offset the anti-referendum messages previously funded by the illegal producer communications expenditures.

Plaintiffs further pray for an award of attorney's fees and costs under the Equal Access to Justice Act, and

for such other legal and equitable relief as the evidence may support or the Court may deem just and proper.

Dated: August 1st, 2001 Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA NORTHERN DIVISION

Civ. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS

WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES

AND

ROBERT M. THULLNER, JOHN L. SMITH, ERNIE J. MERTZ, JOHN WILLIS, PAT GOGGINS, HERMAN SCHUMACHER, JERRY GOEBEL AND LEO ZENTNER ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; ANN VENEMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

INTERVENORS' ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT

Comes now the Defendants, Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones [hereinafter "these Defendants"], and for their Answer to Plaintiffs' third Amended Complaint, state and allege as follows:

1.

That the Plaintiffs' Third Amended Complaint fails to state a claim upon which relief could be granted.

2.

That these Defendants deny each and every allegation, matter and thing contained in the Plaintiffs' Third Amended Complaint, other than those hereinafter admitted.

3.

That these Defendants admit Paragraphs 2, 3, 14, 30, 64, 65, 68, and 70 of the Plaintiffs' Third Amended Complaint.

4.

That these Defendants are without sufficient knowledge or information to admit or deny Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 33, 37, 39, 40, 46, 52, 57, 62, 67, 80, and 115 of the Plaintiffs' Third Amended Complaint.

5.

That these Defendants specifically deny Paragraphs 1, 13, 16, 17, 21, 26, 27, 28, 34, 35, 36, 38, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 53, 54, 55, 56, 58, 59, 60, 61, 63, 66, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, and 116 of the Plaintiffs' Third Amended Complaint.

6.

As to Paragraph 15, 17, 19, 24, 29, 31, and 32, these Defendants admit only that Ann Veneman is the Secretary of Agriculture and that the Beef Promotion and Research Act was enacted at 7 U.S.C. §§ 2901-11. The federal legislation speaks for itself.

7.

As to Paragraph 69, these Defendants deny the allegation to the extent that it implies this was the only communication with the Court. Such correspondence should have no bearing on Plaintiffs' causes of action.

8.

That as an affirmative defense, the alleged actions of the USDA set forth in the Plaintiffs' claims in their Third Amended Complaint, and the assessments and expenditures made pursuant to the Beef Promotion and Research Act constitute governmental speech and do not infringe, or violate the Plaintiffs' First Amendment rights.

9.

That as an affirmative defense, the expenditures and assessments made pursuant to the Beef Promotion and Research Act do not violate the Plaintiffs' First Amendment rights because the USDA, and the United States Government, have a substantial interest in the programs, assessments, and expenditures that are part of the Beef Promotion and Research Act; the programs, assessments and expenditures of the Beef Promotion and Research Act directly advance that interest; and the programs, assessments, and expenditures of the Beef Promotion and Research Act are not more extensive than necessary to serve those governmental interests.

10.

That as a further affirmative defense, the Plaintiffs failed to exhaust their administrative remedies.

11.

That as a further affirmative defense, the beef industry and the Beef Promotion and Research Act, 7. U.S.C. §§ 2901-11, are part of a regulatory scheme or program and comprehensive statutory program for agricultural marketing, which are closely akin to that of the California tree fruit industry, and distinguishable from that of the mushroom industry. As such, Plaintiffs' challenge to the constitutionality of the Beef Promotion and Research Act is controlled by the Supreme Court's opinion in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), as opposed to *United States v. United Foods, Inc.*, 121 S. Ct. 2334, 150 L. Ed. 2d 438.

Plaintiffs' Complaint violates Fed. R. Civ. P. 8(a), in that it is not a short and plaint statement of the claim.

WHEREFORE, Defendants, Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones, request the following relief as to their Answer to Plaintiffs' Third Amended Complaint:

1. That all counts of the Plaintiffs' Third Amended Complaint be dismissed on their merits with prejudice and that these Defendants be entitled to their costs and disbursements herein.

2. For such other and further relief as the Court deems equitable.

Dated this 19th day of September, 2001.

Respectfully submitted,

FRIEBERG, ZIMMER, DUNCAN & NELSON, L.L.P.

By: Signature Illegible

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL., INTERVENOR-DEFENDANTS

JOINT STATEMENT OF STIPULATED FACTS

The parties to the above-captioned action hereby stipulate to the following undisputed material facts:

1. The Cattlemen's Beef Promotion and Research Board ("Board") was established pursuant to the Beef Promotion and Research Act of 1985 ("Act"), 7 U.S.C. §§ 2901-11, and the Beef Promotion and Research Order ("Order"), 7 C.F.R. Part. 1260.

2. The Board is funded wholly through assessments on the sale of cattle and on the importation of cattle, beef and beef products.

3. In the last fiscal year, over $87 million of assessments were collected under the Act. The Beef Board's

budget during the past fiscal year was approximately $67 million.[1]

4. The Board funds advertising and promotion, research, consumer information, and industry information projects. The Board also funds foreign marketing projects, producer communications, program development, evaluation and administration. In the past fiscal year, the Board's foreign marketing budget was approximately $7.5 million.

5. The Board's advertising and promotion projects include all of the Board's activities intended to advance the image and desirability of beef and beef projects, with the intent of improving the competitive position, and stimulating sales, of beef and beef products in the marketplace. The Board's advertising and promotion programs include TV spots, radio and print ads, brochures, and point of sale materials. These include campaigns with general themes to promote beef, such as the "Beef, It's What's For Dinner" campaign. The advertising is directed primarily at consumers and foodservice operators. In the past fiscal year, the Board's advertising and promotion budget was approximately $34 million. Attached hereto as Exhibit A – are examples of some of the Board's advertising and promotion projects.

6. The Board's research projects include studies intended to improve the safety and quality of beef and beef products, including studies to determine how to

[1] The Board's budget consists of assessments collected during the year, plus leftover funds from prior years, minus that portion of the assessments retained by Qualified State Beef Councils, which are entitled to retain up to 50 cents for every dollar collected from domestic produces under the Act.

eliminate food-borne pathogens such as *E. Coli*, Salmonella, and Listeria; studies relating to the nutritional value of beef and beef products; as well as research into new product and market development. The results of many of the research projects funded by the Board are distributed as part of the Board's industry information and consumer information programs. In the past year, the Board's research budget was approximately $10 million. Attached hereto as Exhibit B is a summary of Board-funded research for the year 2000. The results of some of these research projects are included as examples of the consumer and industry information projects attached hereto as Exhibits C and D, respectively.

7. The Board's consumer information projects develop and distribute information to consumers regarding the purchase, preparation and use of the beef and beef products. These projects are in the nature of public and media relations, and are intended to deliver messages to health influencers (doctors, nurses, and dieticians), food editors, and educators. In the past fiscal year, the Board's consumer information budget was approximately $7.5 million. Attached hereto as Exhibit C are examples of some of the Board's consumer information projects.

8. The Board's industry information projects are intended to lead to the development of new markets, marketing strategies, and increased efficiency and enhance the image of the cattle industry. These projects are in the nature of issues management projects, and provide information to producers to help them produce safe and palatable beef that consumers want to buy, as well as information regarding issues affecting the beef industry. In the past fiscal year, the Board's industry information budget was approximately $2 million. Attached hereto as Exhibit D are examples of some of the Board's industry information projects.

Dated: October 18, 2001.

Respectfully submitted,

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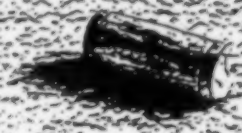
BEST AVAILABLE COPY

Of course you don't have to serve veal, just like you don't have to serve wine with a cork.

Roasted Veal Chop and Spaghetti Squash with Veal Bacon



You do a lot to impress your customers and your menu should reflect this. By serving veal, you show your commitment to quality, creativity and class. And that's something to toast to.

Veal

Eat smart. Eat veal.

For menu ideas and recipes call 1-888-854-VEAL (8325). Or contact us on the web at www.veal.org.

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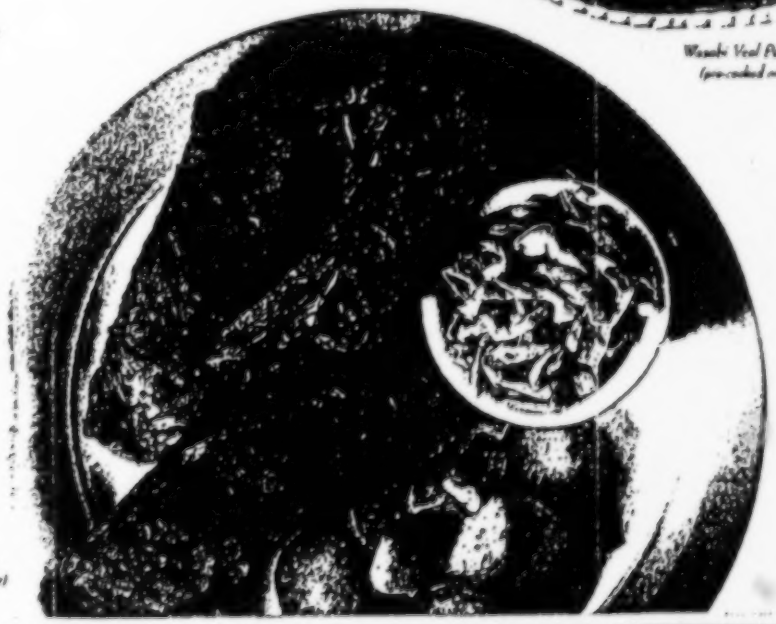
Veal
Excitement Cut with

Wasabi Veal Pot Roast
(pre-cooked or raw)

Andouille Veal Sausage
(pre-cooked)



Veal Ribs
with Cider Sauce
(pre-cooked or raw)

VEAL SAUSAGE · VEAL PARMESAN DIPPERS · VEAL RIBS · PRE-COOKED OSSO BUCO · PRE-COOKED VEAL POT ROAST · CHICAGO VEAL CHOP · GROUND VEAL · PRE-COOKED VEAL PATTIES
VEAL BACON · VEAL SHOULDER SCALLOPINI · VEAL MINI RACK · VEAL GLACE/DEMI GLACE · BREADED VEAL CUTLETS, MEDALLIONS & SCALLOPINI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

[Filed December 29, 2000]

DECLARATION OF NANCY ROBINSON

I, Nancy Robinson, declare:

1. I am the Vice President for Government and Industry Affairs at the Livestock Marketing Association ("LMA"). LMA is a trade association representing livestock marketing businesses, which was established

in 1947 as the National Livestock Auction Association. LMA currently represents more than 800 livestock marketing businesses in the United States, including auction markets, commission firms, dealers, and order buyers.

2. I have been employed with LMA for 11 years. Prior to my employment with LMA, I was a political appointee at the United States Department of Agriculture, where I served as the Director of Information and Legislative Affairs of the Food Safety and Inspection Service from 1981 to 1987, and the Director of Information and Legislative Affairs of the Animal and Plant Health Inspection Service from 1987 to 1988.

3. In the 15 years since the enactment of the 1985 amendments to the Beef Promotion Act, more than $1 billion has been expended from assessments on cattle producers, but beef demand has continued to drop. Exhibit 25. Per capita beef consumption, which had risen through the '60s and '70s to a high point of 89.9 pounds per capita in 1976, had fallen off by 16 percent to 74.7 pounds per capita in 1985, and by 1988, per capita consumption had fallen an additional 13.4 percent, to 64.7 pounds, a full 27 percent lower than the peak consumption of 1976. Exhibit 25.

4. Not only were consumers purchasing much less beef by 1998, but also prices were to frustratingly low levels. Exhibit 6. The low point for cattle prices came at the end of April, 1996, when the popular TV host and commentator Oprah Winfrey responded to panelists discussing a livestock disease by stating that she did not think she could eat beef anymore. Exhibit 5. Within a week cattle prices had dropped to $55 per hundredweight. Unfortunately, prices did not recover significantly in 1997 or in 1998. The Western Kansas

price for fed steers, for example, was below $60 for much of 1998 and never above $70. Livestock Marketing Information Council, 1997-1998, Beef Price Chart. Exhibit 6.

5. During 1997 and 1998, livestock markets found themselves deducting assessments from prices which were already not sufficient to cover producer costs. Producers expressed extraordinary frustration regarding these assessments at livestock markets. As a service to customer-cattlemen, LMA and its members decided to initiate a petition drive to obtain a referendum on continuation of the program. LMA undertook this action to provide producers throughout the United States with an opportunity to have input into the decision whether the program should be continued, terminated or revised.

6. Beginning in 1997, LMA members directed LMA to explore the appropriate procedures for submitting petitions seeking a referendum.

7. In 1997 and early 1998, LMA made inquiries to the Secretary concerning the petition process for a beef referendum. In March, 1998, USDA wrote to LMA, stating to provide current requirements and a sample petition. Exhibit 7. The materials provided by USDA contained sample language for the petition, which LMA adopted in its entirety, and stated that the petition must contain a signature, the date of each signature, the printed name of the signer, the signer's company name (if applicable), the signer's full address, and the signer's telephone number. Exhibit 7. USDA further instructed that each person signing a petition must be subject to assessments under the Beef Promotion and Research Order. Exhibit 7. There was no suggestion that persons signing the petition would be required, at

a later date, to provide additional information or submit personal documents.

8. In an April 9, 1998, letter to LMA's president, William Irons, USDA provided further advice to LMA that initiation of a referendum would require: (1) the verification of 116,791 valid signatures; (2) the determination that the persons who signed the petition are "a representative group of cattle producers," and (3) a decision by the Secretary to conduct the requested referendum. Exhibit 8.

* * * * *

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct. Executed on December 24, 2000, in Downs, Kansas.

/s/ NANCY J. ROBINSON
NANCY ROBINSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF ROBERT M. THULLNER

I, Robert M. Thullner, do hereby declare:

1. I am a cattle producer and have paid and been subject to the mandatory one-dollar-per-head assessment required by the Beef Research and Promotion Order.

2. I am an individual who raises cattle and signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

3. I have some objections to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which I am compelled to pay as a cattle producer.

4. I would like to convey the message that United States cattle and beef are superior to imported beef. I object to being charged for a contrary message, one which promotes beef as a generic commodity. I object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

5. I believe United States beef to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. I object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle, and the association of beef from United States fed cattle with beef from imported cattle.

7. I believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to release or suppress the market obtained by United States cattle producers such as myself. I object to the messages conveyed and

object to financing advertising for the benefit of beef from imported cattle.

8. I also object to the use of mandatory assessments against me for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. And I have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ ROBERT M. THULLNER
ROBERT M. THULLNER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF JOHN L. SMITH

I, John L. Smith, do hereby declare:

1. I am a cattle producer and have paid and been subject to the mandatory one-dollar-per-head assessment required by the Beef Research and Promotion Order.

2. I am an individual who raises cattle and signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

3. I have some objections to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which I am compelled to pay as a cattle producer.

4. I would like to convey the message that United States cattle and beef are superior to imported beef. I object to being charged for a contrary message, one which promotes beef as a generic commodity. I object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

5. I believe United States beef to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. I object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle, and the association of beef from United States fed cattle with beef from imported cattle.

7. I believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers such as myself. I object to the messages con-

veyed and object to financing advertising for the benefit of beef from imported cattle.

8. I also object to the use of mandatory assessments against me for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. And I have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ JOHN L. SMITH
JOHN L. SMITH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

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UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF PAT GOGGINS

I, Pat Goggins do hereby declare:

1. I am a cattle producer and have paid and been subject to the mandatory one-dollar-per-head assessment required by the Beef Research and Promotion Order.

2. I am an Angus breeder, cow/calf operator, and cattle feeder. I estimate that I pay approximately $30,000 annually in beef checkoff assessments. I am the President of the Livestock Marketing Association and owner of Public Auction Yards in Billings, Montana.

3. I have some objections to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which I am compelled to pay as a cattle producer.

4. I would like to convey the message that United States cattle and beef are superior to imported beef. I object to being charged for a contrary message, one which promotes beef as a generic commodity. I object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

5. I believe United States beef to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. I object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle, and the association of beef from United States fed cattle with beef from imported cattle.

7. I believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers such as myself. I object to the messages conveyed and object to financing advertising for the benefit of beef from imported cattle.

8. I also object to the use of mandatory assessments against me for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. And I have objections in the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

9. I also object to the use of mandatory assessments against them for the promotion and advertising of generic beef, as opposed to specific breeds or brands of beef which I believe to be superior types of beef. I object to being charged for a contrary message.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ PAT GOGGINS
PAT GOGGINS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

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UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF HERMAN SCHUMACHER

I, Herman Schumacher, do hereby declare:

1. I am a cattle producer and have paid and been subject to the mandatory one-dollar-per-head assessment required by the Beef Research and Promotion Order.

2. I am an individual who owns a feedyard in South Dakota and pays the mandatory beef checkoff assessments. I also own Herried Livestock Market, Inc. in Herreid, South Dakota.

3. I have some objections to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which I am compelled to pay as a cattle producer.

4. I would like to convey the message that United States cattle and beef are superior to imported beef. I object to being charged for a contrary message, one which promotes beef as a generic commodity. I object to the use of mandatory checkoff dollars for the generic promotion and advertising for beef and imported beef, as opposed to United States beef in particular.

5. I believe United States beef to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. I object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle, and the association of beef from United States fed cattle with beef from imported cattle.

7. I believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers such as myself. I object to the messages

conveyed and object to financing advertising for the benefit of beef from imported cattle.

8. I also object to the use of mandatory assessments against me for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. And I have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ HERMAN SCHUMACHER
HERMAN SCHUMACHER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

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DECLARATION OF JERRY GOEBEL

I, Jerry Goebel, do hereby declare:

1. I am a cattle producer and have paid and been subject to the mandatory one-dollar-per-head assessment required by the Beef Research and Promotion Order.

2. I am an individual cattle producer as defined by the Act.

3. I have some objections to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which I am compelled to pay as a cattle producer.

4. I would like to convey the message that United States cattle and beef are superior to imported beef. I object to being charged for a contrary message, one which promotes beef as a generic commodity. I object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

5. I believe United States beef to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. I object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle, and the association of beef from United States fed cattle with beef from imported cattle.

7. I believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers such as myself. I object to the messages conveyed and object to financing advertising for the benefit of beef from imported cattle.

8. I also object to the use of mandatory assessments against me for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. And I have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ JERRY GOEBEL
JERRY GOEBEL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

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DECLARATION OF PAT GOGGINS

ON BEHALF OF LIVESTOCK MARKETING ASSOCIATION

I, Pat Goggins, do hereby declare:

1. I am currently the President of the Livestock Marketing Association.

2. I would estimate that approximately 90 percent or more of Livestock Marketing Association members are cattle producers subject to the mandatory assessments under the beef checkoff.

3. I have attached as Exhibit A to this Declaration a true and correct copy of the bylaws of the Livestock Marketing Association.

4. Plaintiff Livestock Marketing Association (LMA), 7509 Tiffany Springs Parkway, Kansas City, MO 64153-2315, is a trade association representing livestock marketing businesses, which was established in 1947 as the National Livestock Auction Association. It is incorporated as a not-for-profit organization in the State of Missouri, and its members are persons engaged in operating livestock markets, who regularly engage in the sale of cattle. The Livestock Marketing Association currently represents more than 800 livestock marketing businesses in the United States, including auction markets, commission firms, dealers, and order buyers. Approximately 90 percent of LMA members are market operator and dealers who also have cattle production operations and therefore are subject to and pay as well as collect the mandatory beef checkoff assessments.

5. On behalf of LMA and its members, LMA objects to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which they are compelled to pay as cattle producers.

6. On behalf of LMA and its members, LMA would like to convey the message that United States cattle and beef are superior to imported beef, object to its cattle producer members being charged for a contrary

message, one which promotes beef as a generic commodity, and further object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

7. On behalf of LMA and its members, LMA believes that United States beef is superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and generally inferior and of lesser quality.

8. On behalf of LMA and its members, LMA objects to the promotion of U.S. beef and imported beef as a single, generic commodity and to the promotion of imported beef as indistinguishable from beef from United States fed cattle, and to the association of beef from United States fed cattle with beef from imported cattle.

9. On behalf of LMA and its members, LMA believes that the generic advertising of U.S. beef and imported beef as a single commodity, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers, and therefore objects to the messages conveyed and object to financing advertising for the benefit of beef from imported cattle.

10. On behalf of LMA and its members, LMA also objects to the use of mandatory assessments against its cattle producers for the promotion, advertising, development, or support of generic, brand-name and/or

processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers, and have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ PAT GOGGINS
PAT GOGGINS
President,
Livestock Marketing Association

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF [JOHN D. SMILLIE]

ON BEHALF OF THE WESTERN ORGANIZATION OF RESOURCE COUNCILS

I, John D. Smillie, do hereby declare:

1. I am the Program Director of the Western Organization of Resource Councils ("WORC").

2. Plaintiff Western Organization of Resource Councils ("WORC"), 2401 Montana Avenue, #301, Billings, Montana 59101, is an association of grassroots organizations which, in turn, are composed of affiliated citizens' groups based in 42 communities throughout the region. Members of WORC include the Dakota Resource Council (North Dakota), Dakota Rural Action (South Dakota), the Idaho Rural Council (Idaho), the Northern Plains Resource Council (Montana), the Powder River Basin Resource Council (Wyoming) and the Western Colorado Congress (Colorado). The members of these groups are farmers, ranchers, small business and working people who seek to protect natural resources, family farms, and rural communities, including cattle producers who are subject to and pay the mandatory beef checkoff assessments. A large percentage of the members of WORC's member organizations are cattle producers who are subject to and pay the mandatory beef checkoff assessments.

3. On behalf of WORC's member organizations and their members, WORC objects to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which they are compelled to pay as cattle producers.

4. On behalf of WORC's member organizations and their members, WORC would like to convey the message that United States cattle and beef are superior to imported beef, object to cattle producer members being charged for a contrary message, one which promotes beef as a generic commodity, and further object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

5. On behalf of WORC's member organizations and their members, WORC believes that United States beef is superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. On behalf of WORC's member organizations and their members, WORC objects to the promotion of U.S. beef and imported beef as a single, generic commodity and to the promotion of imported beef as indistinguishable from beef from United States fed cattle, and to the association of beef from United States fed cattle with beef from imported cattle.

7. On behalf of WORC's member organizations and their members, WORC believes that the generic advertising of U.S. beef and imported beef as a single commodity, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by the United States cattle producers, and therefore object to the messages conveyed and object to financing advertising for the benefit of beef from imported cattle.

8. On behalf of WORC's member organizations and their members, WORC also objects to the use of mandatory assessments against its cattle producers for the promotion, advertising, development, or support of generic, brand-name and/or or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers, and have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and

beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

9. I have attached as Exhibit A to this declaration a true and correct copy of the mission statement (or by-laws, whichever is appropriate) of the Western Organization of Resource Councils.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

Dated this 16th day of October, 2001.

(Illegible)
John D. Smillie, Program Director
Western Organization of Resource Councils

Our dollar builds the business from our state on up..."

Pete and Jo Bouls, with daughter, April

BEEF

Cattlemen's Beef Board

"Our beef checkoff dollar is the only industry-wide, self-help tool cattlemen have to promote beef now and in the future."

Our beef checkoff is fair: All producers and importers pay the same $1 per head.

Our beef checkoff is state-based: One-half of the money collected — 50 cents of every dollar — is controlled by state beef councils.

Our beef checkoff is accountable: All checkoff-funded programs are budgeted and evaluated by the Beef Board, an independent organization of 111 "grassroots" volunteers.

Our beef checkoff is producer-led: Board members are nominated by fellow state producers.

Find out more about your beef checkoff, call toll-free: 1-888-565-BEEF.

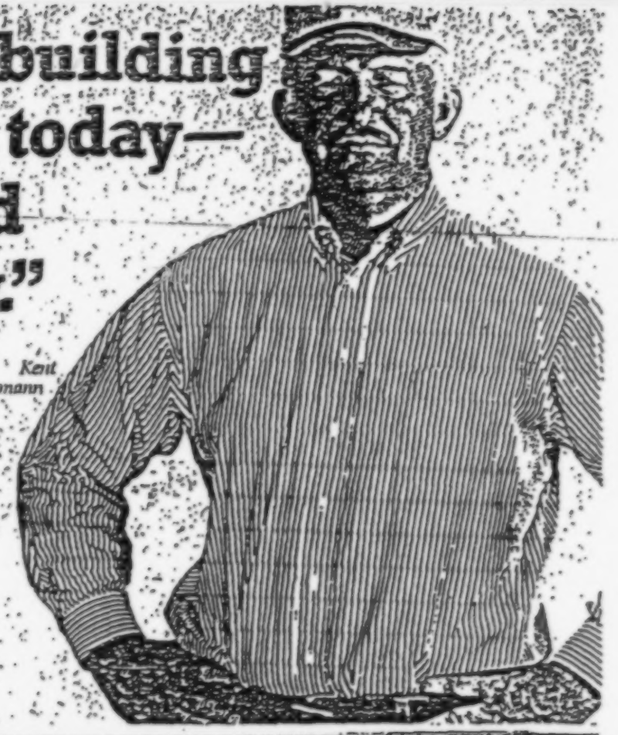
BEEF

Your beef checkoff

PLAINTIFF'S EXHIBIT 26A

BEST AVAILABLE COPY

My dollar's building the future today— for me and my family."



Kent Pruismann

BEEF

Cattlemen's Beef Board

"Your beef checkoff dollar is the only industry-wide, self-help tool cattlemen have to promote beef now and in the future."

Here are a few examples of the good work your dollar did for your cattle industry:

Your beef checkoff brings accurate nutrition education to millions of kids: More than 24 million preschoolers have heard about the importance of beef in a well-balanced diet thanks to checkoff-funded "Munchster" kits aimed at educating our future consumers.

Your beef checkoff pays for research to improve the safety of beef: From processing to packaging to preparation, 22 recent checkoff-funded food safety studies have already paid off in new procedures, techniques or products to ensure beef safety.

Your beef checkoff helps develop new, quick-to-prepare, value-added products: Pre-cooked, heat 'n eat chuck and round main courses, such as pot roast, appeal to the 40% of Americans who choose dinner based on ease of preparation.

Find out more about your beef checkoff, call toll-free: 1-888-565-BEEF.

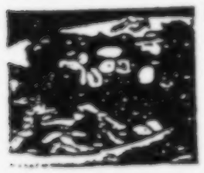
BEEF

Your beef checkoff builds the future today

"Thanks to my beef checkoff, pot roast is now fast food for families with no time to cook."

My dollar did it. My beef checkoff dollar is helping develop new *heat 'n eat* main courses using chuck and round cuts. They're fully cooked when consumers buy them and ready to serve in less than 10 minutes. Best of all, they're not only fast, they taste great.

These new, value-added products really appeal to the 40% of Americans who choose dinners based on ease of preparation. And they might never have happened without the help of my checkoff dollar. Now, I know these *heat 'n eat* meals are just one step in strengthening our industry. But they're helping build a future business my kids can be part of. That gives me a sense of pride faster than you can say "Dinner's ready!"

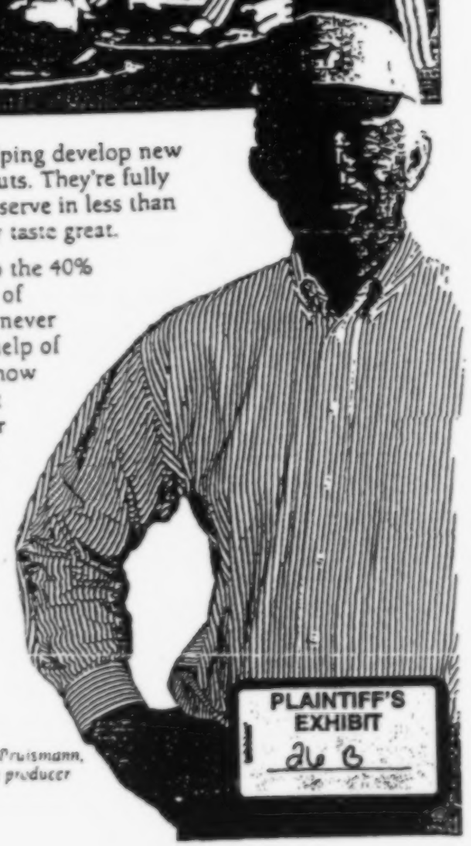


To find out more about our beef checkoff, contact your state beef council or the Cattlemen's Beef Board.

BEEF

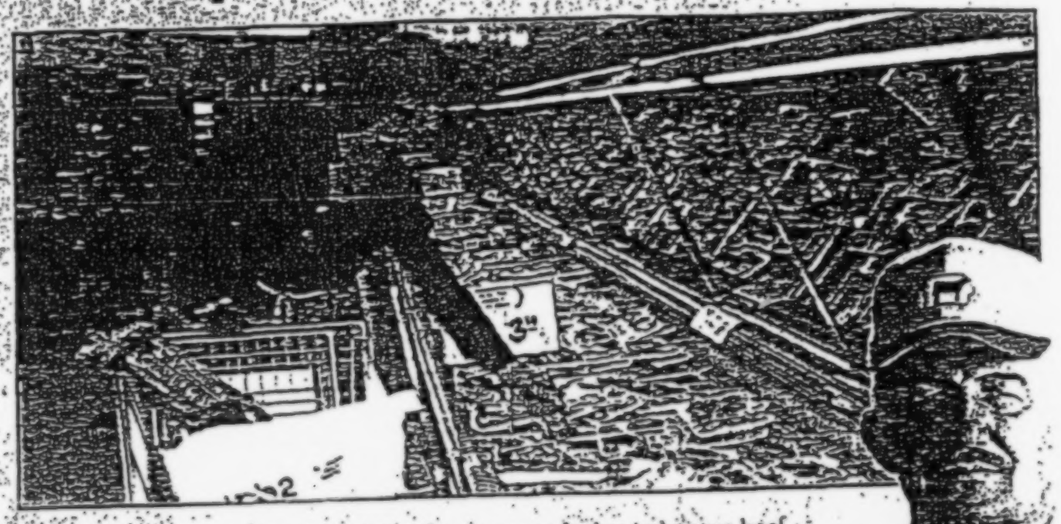
Our beef checkoff, working for the future today.

Kent Pruismann, cattle producer



©1998 Cattlemen's Beef Board
PO Box 3316 Englewood, CO 80155
WBA 1548

"Thanks to my checkoff, consumer confidence in beef safety is well-deserved."



My dollar did it. My checkoff dollar funds research that enhances beef safety from processing through packaging and preparation. In fact, 22 recent checkoff-funded food safety studies have already paid off in new procedures, techniques or products to ensure beef safety. Consumers feel good about serving beef to their families when they know it's a safe and wholesome food.

Improving the safety of an already safe product is just one step in strengthening our industry. But it's supporting and building consumer confidence in beef now and for the future. That extra margin of beef safety means my family can feel a little more secure in the cattle business. To me, that's a fair return for a buck.

Find out more about your beef checkoff, call toll-free: 1-888-565-BEEF.

BEEF

Your beef checkoff builds the future today.

Kent Pruismann

"Thanks to my checkoff, millions of kids are seeing how beef belongs in a balanced diet."

My dollar did it. My beef checkoff dollar has helped send out 134,000 nutrition education kits to preschoolers and their teachers over the last several years. Now, more than 24 million kids have seen and heard the real story about beef in a balanced diet. And, they're forming good eating habits they can keep for the rest of their lives.

Giving kids the facts about beef is just one step in strengthening our industry. But it's helping them learn to ask for beef now and in the future. And that means my son can continue in our family business that my grandfather started. To my way of thinking, the checkoff is an educational investment that really pays off.

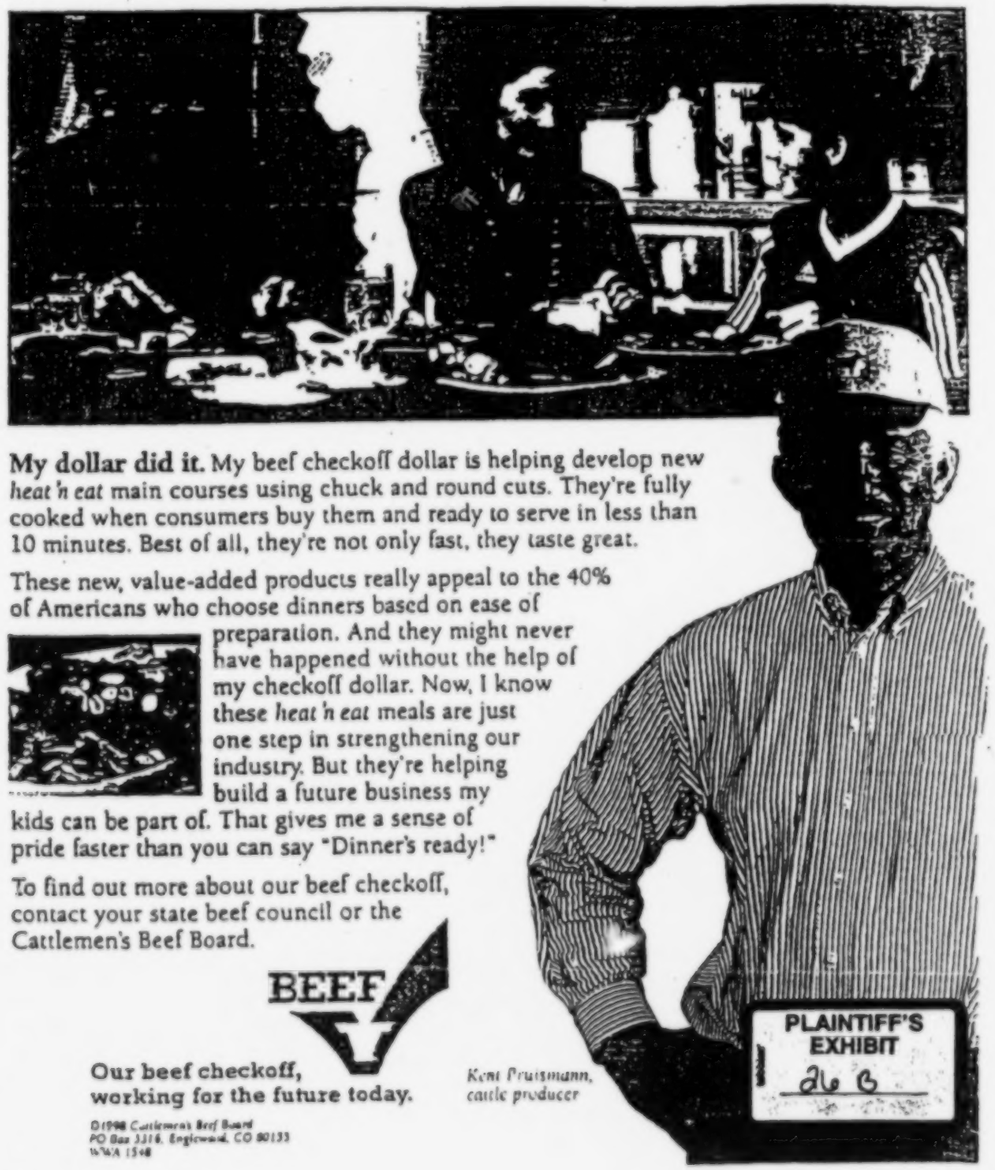
Find out more about your beef checkoff, call toll-free 1-888-565-BEEF.

Kenny Rogers with son, Jare

BEEF

Your beef checkoff builds the future today.

"Thanks to my beef checkoff, pot roast is now fast food for families with no time to cook."



My dollar did it. My beef checkoff dollar is helping develop new *heat 'n eat* main courses using chuck and round cuts. They're fully cooked when consumers buy them and ready to serve in less than 10 minutes. Best of all, they're not only fast, they taste great.

These new, value-added products really appeal to the 40% of Americans who choose dinners based on ease of preparation. And they might never have happened without the help of my checkoff dollar. Now, I know these *heat 'n eat* meals are just one step in strengthening our industry. But they're helping build a future business my kids can be part of. That gives me a sense of pride faster than you can say "Dinner's ready!"

To find out more about our beef checkoff, contact your state beef council or the Cattlemen's Beef Board.

BEEF

Our beef checkoff, working for the future today.

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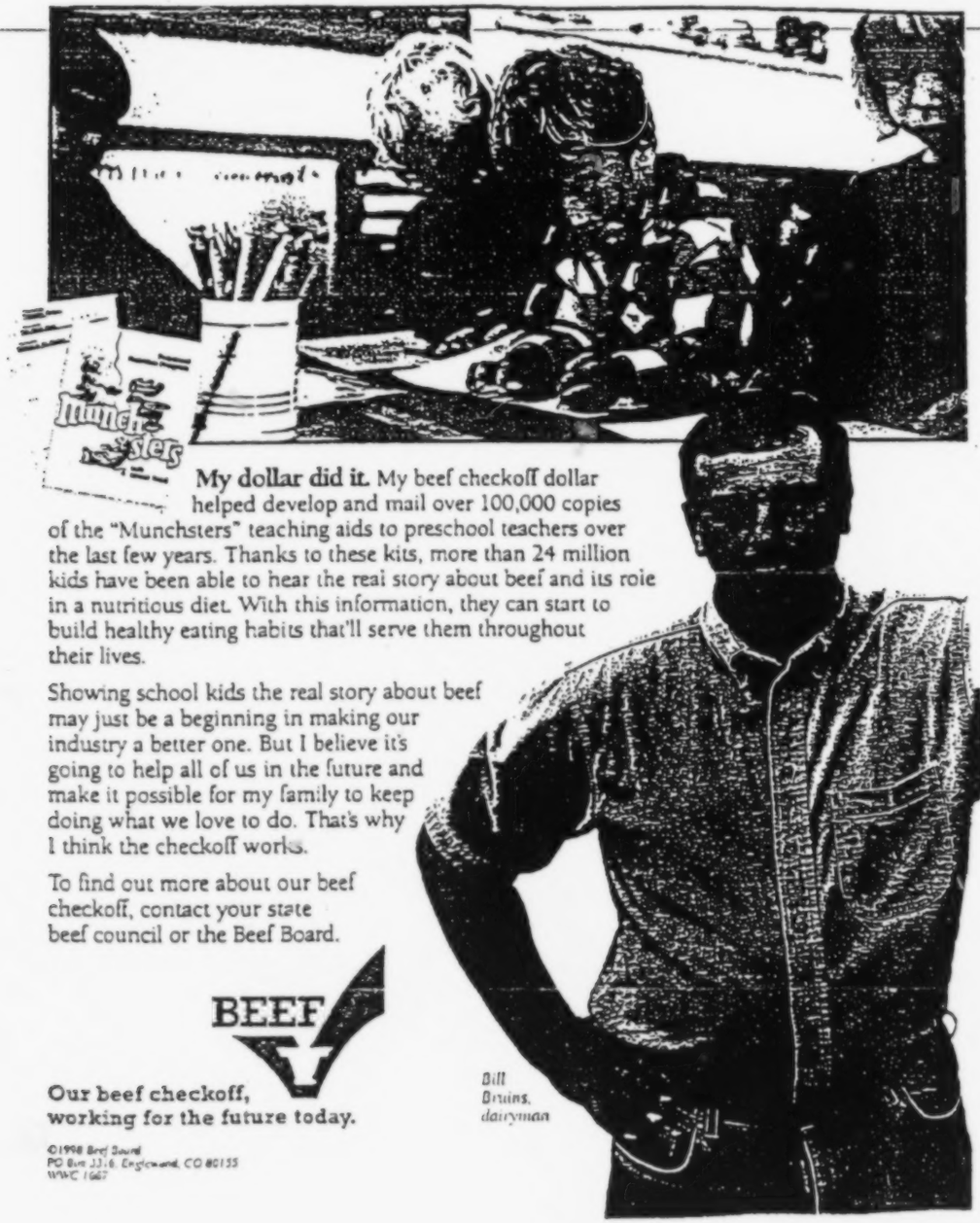
PO Box 3316, Englewood, CO 80133
WMA 1548

Kent Pruismann, cattle producer

PLAINTIFF'S EXHIBIT 26 B

"Thanks to my checkoff, kids are hearing the real story about beef."



My dollar did it. My beef checkoff dollar helped develop and mail over 100,000 copies of the "Munchsters" teaching aids to preschool teachers over the last few years. Thanks to these kits, more than 24 million kids have been able to hear the real story about beef and its role in a nutritious diet. With this information, they can start to build healthy eating habits that'll serve them throughout their lives.

Showing school kids the real story about beef may just be a beginning in making our industry a better one. But I believe it's going to help all of us in the future and make it possible for my family to keep doing what we love to do. That's why I think the checkoff works.

To find out more about our beef checkoff, contact your state beef council or the Beef Board.

BEEF

Our beef checkoff, working for the future today.

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PO Box 3316, Englewood, CO 80155
WWC 1662

Bill Bruins, dairyman

"Thanks to my checkoff, millions of kids are seeing how beef belongs in a balanced diet."

My dollar did it. My beef checkoff dollar helped send out 134,000 nutrition education kits to preschoolers and their teachers over the last several years. Now, more than 24 million kids have seen and heard the real story about beef in a nutritious diet. And they're forming good eating habits they can keep for the rest of their lives.

Giving kids the facts about beef is just one small step in strengthening our industry. It's helping them learn to ask for beef now and in the future. And that means my son can continue on the ranch that's been in the family for almost 100 years. To my way of thinking, the checkoff is an educational investment that really pays off.

To find out more about our beef checkoff, contact your state beef council or the Cattlemen's Beef Board.

BEEF

Our beef checkoff, working for the future today.

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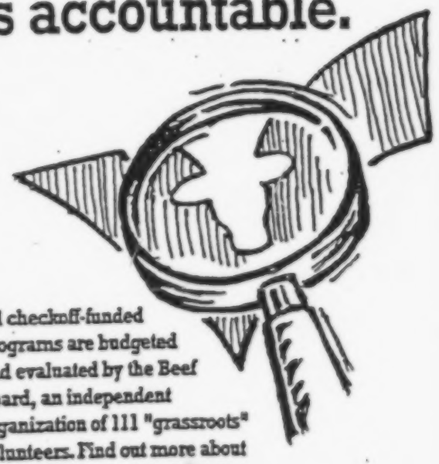
PO Box 3316, Englewood, CO 80155
WWB 1548

Kenny Rogers and son Joce, cattle producers

Your beef checkoff is accountable.



All checkoff-funded programs are budgeted and evaluated by the Beef Board, an independent organization of 111 "grassroots" volunteers. Find out more about your beef checkoff. Call toll-free 1-888-565-BEEF.

BEEF

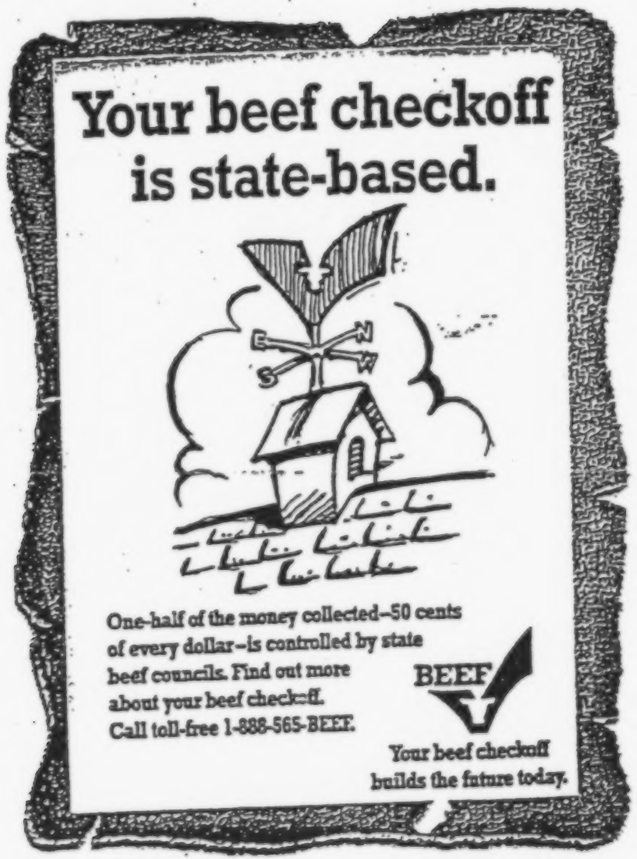
Your beef checkoff builds the future today.

Your beef checkoff is producer-led.

Board members are nominated by fellow state producers. Find out more about your beef checkoff. Call toll-free 1-888-565-BEEF.

BEEF

Your beef checkoff builds the future today.


Your beef checkoff
is state-based.
One-half of the money collected–50 cents
of every dollar–is controlled by state
beef councils. Find out more
about your beef checkoff.
Call toll-free 1-888-565-BEEF.
BEEF
Your beef checkoff
builds the future today.

Your
beef checkoff
is fair.
All producers and importers pay the same $1 per head.
Find out more about your beef checkoff.
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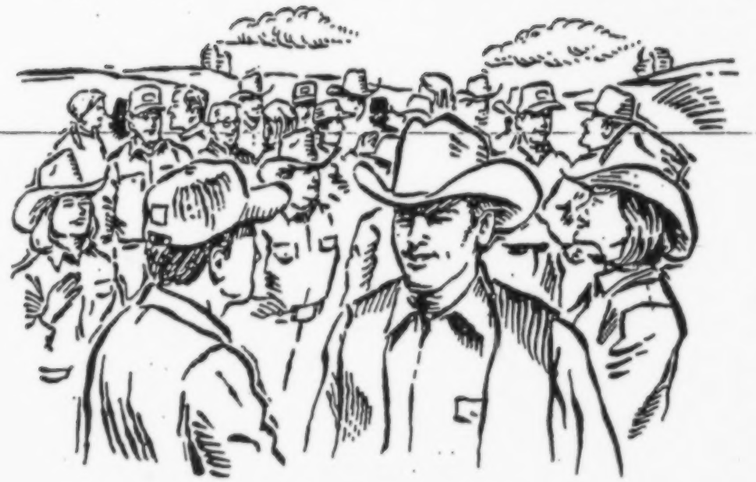


Our beef checkoff... producers helping producers.

Producers run our beef checkoff. The beef checkoff is effective because the people making the decisions are producers just like us. They were nominated to their positions by fellow producers. In fact, the Cattlemen's Beef Board is made up of 111 checkoff-paying individuals. That's how we know our best interests are being represented, because what's important to us is also important to the people deciding how our checkoff dollars are used.

Our checkoff is accountable. Because our state and national checkoff organizations are run by beef producers who are also investors, we know they are carefully judging and evaluating all checkoff-funded projects. When they fund checkoff programs, they are investing their money along with ours. This system of producers working to help producers is what's helping us aim for a better future today.

BEEF

Our beef checkoff, working for the future today.

©1999 Cattlemen's Beef Board, PO Box 1318, Englewood, CO 80155

C88-002

Our beef checkoff helps us all prepare for the future.

Our beef checkoff works at the state level. One-half of the checkoff funds collected by our state beef council is used right here. These dollars work with national funds to help improve the beef industry in our own state. And the people who decide how these dollars are used are producers who pay the checkoff and understand what's best for our state and our business.

Our beef checkoff is fair for everyone. All producers and importers pay the same $1 per head. We all pay the same, we all benefit. Our checkoff investments are working to increase demand for beef here in our own state as well as in major consumer areas throughout this country and the world. Through our beef checkoff, we're all working for a better future today.

BEEF

Our beef checkoff, working for the future today.

©1999 Cattlemen's Beef Board, PO Box 1318, Englewood, CO 80155

C88-001

ıy Producers Say They ɔport Our Beef Checkoff

ɔroducers created our checkoff as a self-help ɔtion, research and information program. It was ɔved in 1988 by 79 percent of beef producers in a ɔndum after grassroots input shaped the program. ɾ 1998, a Producer Attitude Survey conducted by ɔn Research showed that 68 percent of cattlemen ɔve of the checkoff. The structure of the checkoff ɔram is based on the following directive:

ɔ is fair. All producers and importers pay the same ɔe head.

ɔ is state based. One-half of the money collected ɔtate beef councils – 50 cents of every dollar – is ɔtrolled by producers in the state.

ɔ is accountable. All checkoff-funded programs are ɔgeted and evaluated by the Beef Board, an ɔpendent organization of 111 checkoff-paying ɔrkers.

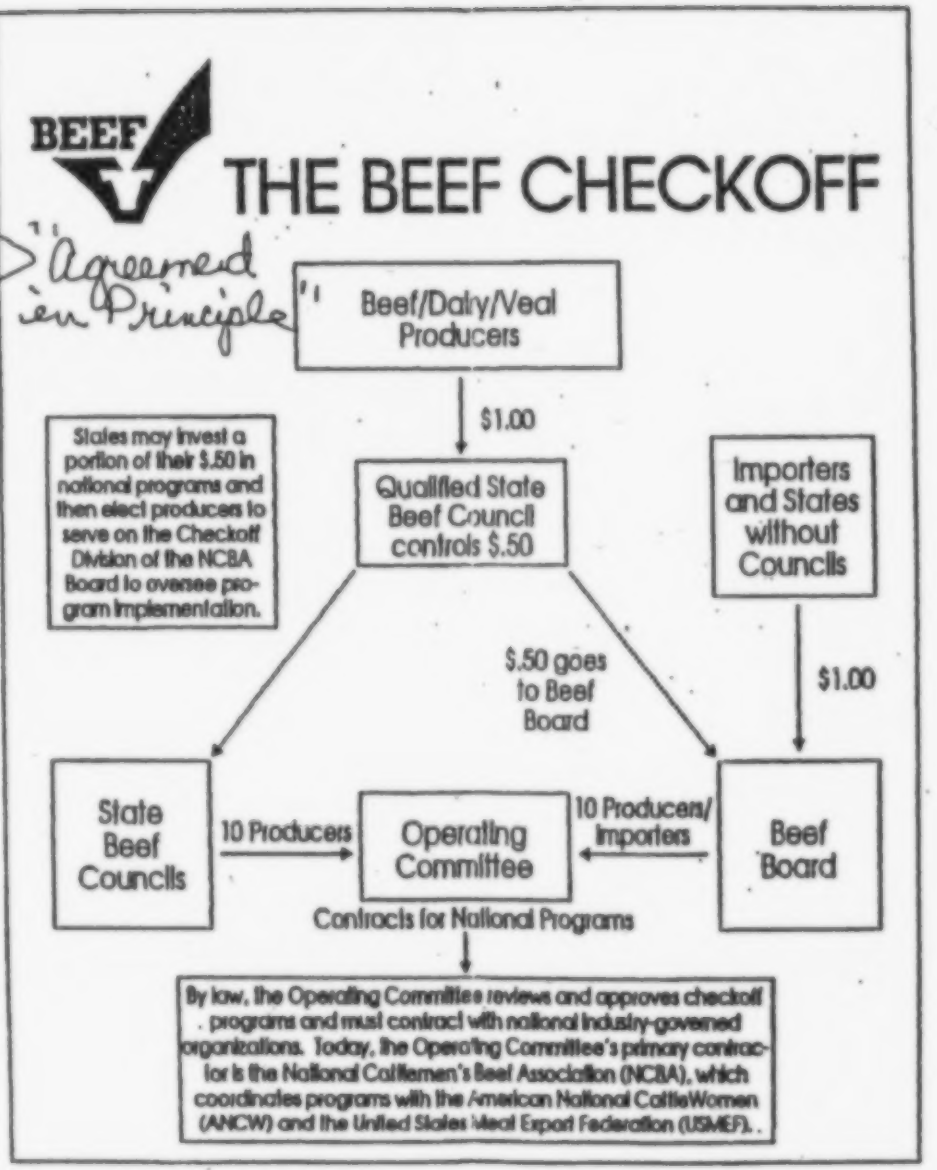
ɔ is producer-led. Beef Board members are ɔminated by fellow state producers.

ɔhat can our checkoff do?

ɔ checkoff is the only industry-wide, self-help tool we ɔe to fight for the success of the industry. Our ɔckoff acts as a catalyst for change. Our checkoff ɔsn't own cattle, packing plants or retail outlets. It ɔn't single-handedly turn around a bad market. We, ɔ beef producers, never intended it to be in the ɔsiness of growing cattle or handling product. What ɔ wanted was a way to stimulate others to sell more ɔf and consumers to buy more beef. This can be ɔne through direct advertising, cooperative market- ɔ, public relations efforts, education programs and ɔw product development assistance.

ɔhat can't our checkoff do?

ɔw, our checkoff funds cannot be used to influence ɔvernment policy or action, including lobbying.



Our Beef Checkoff Structure

The Beef Promotion and Research Act outlines the specific responsibilities of the organizations that comprise the checkoff structure.

Beef Board

Created by the Beef Promotion and Research Act to administer the beef checkoff program, the Beef Board consists of 111 members nominated by state producer organizations and importers, all of whom are then appointed by the Secretary of Agriculture. Duties include certification of state beef councils, evaluation of programs, annual budget approval and overseeing the collection of the $1-per-head beef checkoff. Administrative costs for the Beef Board are capped at 5 percent. The Beef Board selects ten of its members to serve on the Operating Committee.

State Beef Councils

State beef councils collect the $1-per-head checkoff and retain control of 50 cents of every dollar to conduct and implement programs in each state that are consistent with the Beef Promotion and Research Act. The councils may invest a portion of their 50 cents in national and international programs, and participate in deciding which programs to fund. Together as a federation, states select 10 members to serve on the Operating Committee.

Operating Committee

Also created by the Beef Promotion and Research Act, the Operating Committee reviews and approves national checkoff programs and contracts with national industry-governed organizations, such as National Cattlemen's Beef Association, to implement programs. Through the Operating Committee, the entire dollar comes together in a coordinated state/national program. Checkoff programs are conducted on a cost-recovery basis. In other words, contractors may not profit from work they do on behalf of the beef checkoff.

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PLAINTIFF'S EXHIBIT 28C

BEEF

The Beef Checkoff, your money at work

BY SHARYL PHIPPS

"My family's Holstein dairy and farming operation has been in business since 1840. We know a few things about handling cash flow and what makes good business sense," says Gil Tucker, a dairyman from Finchville, Ky., and 1999 treasurer of the Cattlemen's Beef Board. "I'm pretty tight with my money at home. I'm also tight with money collected by the beef checkoff. As treasurer of the Beef Board, I watch those dollars closely."

Gil Tucker

Tucker was appointed to the CBB in 1994 and has served on its Executive Committee since 1995. He is the first dairyman elected to an officer position on the Board.

"I believe in the beef checkoff program — its effectiveness and its accountability," says Tucker. "If I can't support an industry that I truly believe in with a dollar checkoff, then how can I say that I even support the industry? This is my last year on the Board, and as treasurer, I want to help eliminate confusion in the country about the accountability of funds and the direction of dollars.

"The Beef Board is not a rubber stamp," continues Tucker. "We are all producers who are in business to make money. No good businessman supports an effort that is not on-the-level or takes money out of his pocket. It aggravates me when I hear accusations that the CBB is not accountable or that NCBA is controlling the checkoff."

Strict firewalls are in place to ensure that dues and checkoff dollars are never mixed. The Beef Board is audited by an independent accounting firm every year. Contracting organizations are also periodically audited to test that expenditures of checkoff funds are authorized, that they do not exceed the actual costs of projects, and that they comply with CBB contracts. Prior to the 1996 merger of the National Cattlemen's Association (NCA) and Beef Industry Council (BIC) — which formed the National Cattlemen's Beef Association — NCA and BIC were the primary contractors conducting checkoff programs. Today, NCBA is the primary contractor working with same high level of accountability.

"Although NCBA is the primary contractor," says Tucker, "it does not receive special treatment from the Operating Committee when it comes to funding programs.

The Operating Committee is made up of producers elected by state beef councils and the Beef Board. They all ask tough questions when it comes to funding programs. Last year, more than $10 million in project requests were turned down by the Operating Committee. About half of those programs were proposed by NCBA.

"The program is accountable," continues Tucker, "and fair — everybody pays the same dollar per head, including importers and packers. Packers pay the checkoff whenever they own cattle for more than 10 days before slaughter, or whenever they own cattle through a contract with a local producer. I hear complains that packers should pay the checkoff on every head slaughtered, but cattlemen designed the checkoff to be producer-controlled. If packers paid a dollar on every head slaughtered, they'd be entitled to some of the Board seats."

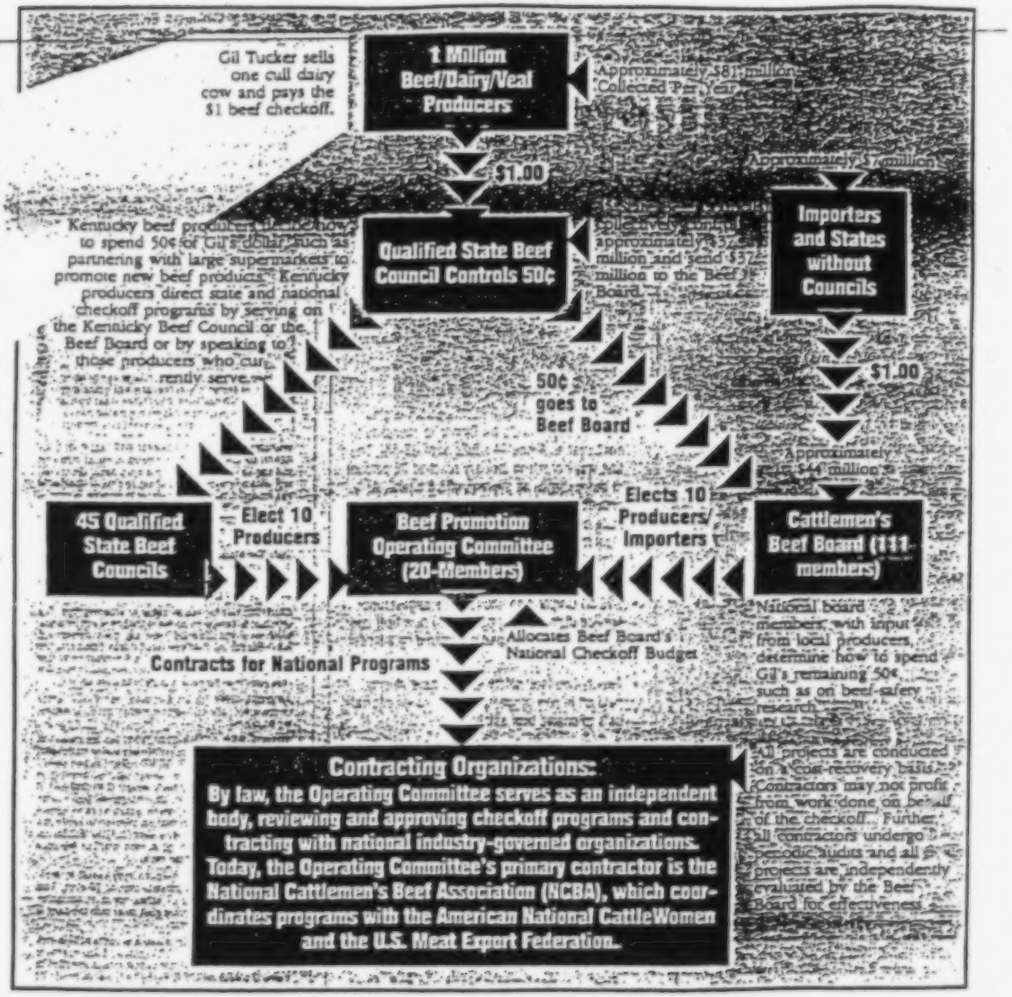
Today, the Board consists of 104 beef, dairy beef and veal producers, as well as seven importers.

"The checkoff works," says Tucker. "As a Beef Board member, I'm accountable to my fellow producers and as treasurer, I'm committed to watching those dollars like I do my own."

The Checkoff

Beef producers created the checkoff as a self-help promotion, research and information program with legislation in the 1985 Farm Bill. It was approved in 1988 by 79 percent of beef producers in a referendum, after grassroots input shaped the program:

- It's fair. Everybody pays the same $1 per head.
- It's state-based. Half of the money collected by state beef councils — 50 cents of every dollar — is controlled by producers in the state.
- It's accountable. All checkoff programs are budgeted and evaluated by the Beef Board, an independent organization of 111 checkoff-paying volunteers.
- It's producer-led. Beef Board members are nominated by fellow state producers.



The Checkoff: What It Can and Can't Do

The checkoff is the only industry-wide, self-help tool we have to fight for the success of the beef industry. The checkoff acts as a catalyst for positive change. It doesn't own cattle, packing plants or retail outlets. It can't single-handedly turn around a bad market. What beef producers wanted when they created the checkoff was a way to stimulate others to sell more beef and stimulate consumers to buy

(Continued on page 98)

(Continued from page 97)

more beef. This can be done through programs like advertising, new product development and education.

By law, checkoff funds can't be used to influence government policy or action, including lobbying.

The Beef Board

The Cattlemen's Beef Board was created by the Beef Promotion and Research Act to administer the beef checkoff program. It is, and always has been, an independent organization.

The CBB consists of 111 members (representative of geographical regions and cattle populations) nominated by state producer organizations and importers. All of them are then appointed by the U.S. Secretary of Agriculture. Duties include certifying state beef councils, evaluating programs, annual budget approval and overseeing the collection of assessments. Administrative costs for the CBB are capped at 5 percent and in 1998 were 3.1 percent. The CBB selects 10 of its members to serve on the Operating Committee.

State Beef Councils

State beef councils collect the $1-per-head checkoff and retain control of 50 cents of every dollar to conduct and implement programs in each state that are consistent with the Beef Promotion and Research Act. The councils may invest a portion of their 50 cents in national checkoff programs (to assist in reaching international markets and highly-populated areas where fewer dollars are collected), and participate in setting national and international program direction. States caucus to select 10 members to serve on the Operating Committee.

Operating Committee

Also created by the Beef Promotion and Research Act, the Beef Promotion Operating Committee acts as an independent body to review and approve national checkoff programs. It contracts with national industry-governed organizations, such as NCBA, to implement programs. Through the Operating Committee, the entire dollar comes together in a coordinated state/national checkoff program.

The Checkoff Did It

- The current advertising campaign is bringing the "Beef. It's What's for Dinner."® message to our target audience — adults ages 25-54. The first wave of ads in January reached 86 percent of our audience an average of 3.8 times. A second wave of advertising hit in April, with state beef councils extending the campaign with local radio and print advertising, as well as retail and foodservice partnerships with manufacturers of heat-and-serve beef products.
- SYSCO Corporation, the nation's largest foodservice distributor, introduced 30 new beef and veal products developed or inspired by the beef checkoff.
- Twenty-two food safety studies have already paid off in new procedures, techniques or products to ensure beef safety.
- Over the past five years, U.S. beef and beef-variety-meat exports to Japan have increased by 24 percent. In value terms, Japan represents about 55 percent of all U.S. beef and beef variety meat exports.
- Two summer co-op promotions with Arby's were big successes. Stores participating in the promotions moved an average of 2,867 pounds of beef a month — an incremental increase of 300 pounds per store.
- A new education tool for junior and senior high school teachers called "Take a Cook on the Wild Side" was distributed in March and April. About 95 percent of the country's family and consumer science teachers — nearly 20,000 in all — received the kit containing messages about food safety, nutrition, convenience, underutilized beef cuts and new fully-prepared products.
- Sales of U.S. beef to Mexico saw a 32 percent increase in beef and beef-variety-meat purchases (by value) during the first 11 months of 1998 over the same period in 1997 ■

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Williams & Williams Investments acquires rural real estate (200 acres and up) nationwide for a select group of investors — single properties, turn-key operations or entire portfolios. We pay cash and usually close in 30 days. Brokers protected. Call for a brochure or visit our web site at www.williamsinvestments.com.

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(918) 250-2012 EXT. 236 / (918) 250-1916 FAX

Circle 45 on the Reply Card

BRIEF SUMMARY

NADA 141-063, Approved by FDA

Nuflor®
(FLORFENICOL)
Injectable Solution 300 mg/mL

For Intramuscular and Subcutaneous Use in Cattle Only.
CAUTION: Federal law restricts this drug to use by or on the order of a licensed veterinarian.

DESCRIPTION: NUFLOR is a solution of the synthetic antibiotic florfenicol. Each milliliter of sterile NUFLOR Injectable Solution contains 300 mg of florfenicol, 250 mg n-methyl-2-pyrrolidone, 150 mg propylene glycol, and polyethylene glycol q.s.

INDICATIONS: NUFLOR Injectable Solution is indicated for treatment of bovine respiratory disease (BRD) associated with *Pasteurella haemolytica*, *Pasteurella multocida*, and *Haemophilus somnus*; and for the treatment of bovine interdigital phlegmon (foot rot, acute interdigital necrobacillosis, infectious pododermatitis) associated with *Fusobacterium necrophorum* and *Bacteroides melaninogenicus*. Also, it is indicated for the control of respiratory disease in cattle at high risk of developing BRD associated with *Pasteurella haemolytica*, *Pasteurella multocida*, and *Haemophilus somnus*.

RESIDUE WARNINGS: Animals intended for human consumption must not be slaughtered within 28 days of the last intramuscular treatment. Animals intended for human consumption must not be slaughtered within 38 days of subcutaneous treatment. Do not use in female dairy cattle 20 months of age or older. Use of florfenicol in this class of cattle may cause milk residues. A withdrawal period has not been established in preruminating calves. Do not use in calves to be processed for veal.

WARNINGS: NOT FOR HUMAN USE. KEEP OUT OF REACH OF CHILDREN. This product contains materials that can be irritating to skin and eyes. Avoid direct contact with skin, eyes, and clothing. In case of accidental eye exposure, flush with water for 15 minutes. In case of accidental skin exposure, wash with soap and water. Remove contaminated clothing. Consult a physician if irritation persists. Accidental injection of this product may cause local irritation. Consult a physician immediately. The Material Safety Data Sheet (MSDS) contains more detailed occupational safety information.

For customer service, adverse effects reporting, and/or a copy of the MSDS, call 1-800-211-3272.

PRECAUTIONS: Not for use in cattle of breeding age. The effects of florfenicol on bovine reproductive performance, pregnancy, and lactation have not been determined. Intramuscular injection may result in local tissue reaction which persists beyond 28 days. This may result in trim loss of edible tissue at slaughter. Tissue reaction at injection sites other than the neck is likely to be more severe.

ADVERSE EFFECTS: Inappetence, decreased water consumption, or diarrhea may occur transiently following treatment.

DOSAGE AND ADMINISTRATION: For treatment of bovine respiratory disease (BRD) and bovine interdigital phlegmon (foot rot): NUFLOR injectable Solution should be administered by intramuscular injection to cattle at a dose rate of 20 mg/kg body weight (3 mL/100 lbs). A second dose should be administered 48 hours later. Alternatively, NUFLOR Injectable Solution can be administered by a single subcutaneous injection to cattle at a dose rate of 40 mg/kg body weight (6mL/100 lbs). Do not administer more than 10 mL at each site. The injection should be given only in the neck.

NOTE: Intramuscular injection may result in local tissue reaction which persists beyond 28 days. This may result in trim loss of edible tissue at slaughter. Tissue reaction at injection sites other than the neck is likely to be more severe.

For control of respiratory disease in cattle at high risk of developing BRD: NUFLOR injectable Solution should be administered by a single subcutaneous injection to cattle at a dose rate of 40 mg/kg body weight (6 mL/100 lbs). Do not administer more than 10 mL at each site. The injection should be given only in the neck.

Clinical improvement should be evident in most treated animals within 72 hours of initiation of treatment. If a positive response is not noted within 72 hours of initiation of treatment, the diagnosis should be reevaluated.

January 1999

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AMS USDA

Livestock and Seed Program
AMS USDA SEARCH

RESEARCH AND PROMOTION PROGRAMS

BEEF

Beef Promotion and Research Order

History
Major Provisions
Organizational Structure
Production, Exports, and Imports
Economic Evaluation

History

The Beef Promotion and Research Order is authorized by the Beef Promotion and Research Act of 1985 [7 U.S.C. 2901-2918]. The Act was passed as part of the 1985 Farm Bill. The program became effective on July 18, 1986, when the Order was issued. Assessments began on October 1, 1986.

As required by the Act, USDA conducted a referendum among all cattle producers and importers after the program had been in effect no longer than 22 months to determine whether the program should continue. Of the 256,505 valid ballots cast in the May 10, 1988, referendum, 78.91 percent of cattle producers and importers voting favored the program.

TOP

Major Provisions

The program's goal is to strengthen the position of beef in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. The program is funded by a mandatory assessment of $1-per-head collected each time cattle are sold. All producers owning and marketing cattle, regardless of the size of their operation or the value of their cattle, must pay the assessment. A comparable assessment is collected on all imported cattle, beef, and beef products. Assessments under this program, which total about $80 million annually, are used to fund promotional campaigns and to conduct research studies in such areas as heart disease and dietary cholesterol, the role of beef in human diets, and the development of new low-fat, low-cholesterol beef products. In 1996, the total collected from imports was $6.2 million.

TOP

Organizational Structure

The program is administered by the Cattlemen's Beef Promotion and Research Board, which has 111 members representing 37 States and 4 geographical units, with 1 additional unit representing importers. Each year, the Secretary appoints one-third of all Board members from cattle producers and importers nominated by eligible organizations.

The Board administers the Order, approves budgets, and elects 10 members to a Beef Promotion Operating Committee. This Committee--consisting of 20 members (3 Board Officers, 7 Board members, and 10 individuals from State beef councils)--is responsible for developing budgets, awarding contracts, and approving projects for beef promotion and research activities. The Board also elects an 11-member Executive Committee to perform necessary administrative functions and act on behalf of the Board under authority granted by

PLAINTIFF'S EXHIBIT 62 447

the Board between Board meetings.

The Board's office is located in Englewood, Colorado.

TOP

Production, Exports, and Imports

On January 1, 1997, the United States cattle inventory totaled approximately 101.2 million cattle and calves. Texas led in cattle inventory with 14.1 million, followed by Kansas and Nebraska with 6.5 million each.

In 1996, U.S. beef exports totaled 611,456 metric tons valued at approximately $2.4 billion. Japan was largest U.S. market representing 55 percent of exports. Emerging markets for U.S. beef in 1996 were China, Taiwan, Saudi Arabia, and Hong Kong. Exports account for nearly 13 percent of the wholesale value of total U.S. beef production. Additionally, in 1996, the U.S. exported 174,307 head of dairy and beef cattle valued at approximately $113 million.

In 1996, the U.S. imported about 707,685 metric tons of beef valued at approximately $1.3 billion. Additionally, in 1996, U.S. imported approximately 2 million head of live cattle valued at approximately $1.2 billion. Under the beef checkoff program, imports of live cattle are assessed $1.00 per head and imported beef and beef products are assessed an equivalent amount

TOP

Economic Evaluation

Economic evaluations of the program have been conducted periodically since its inception by Dr. Ron Ward of the University of Florida. In his April 1996 publication, "The Beef Checkoff Impact on U.S. Beef Demand," Dr. Ward reports that for the period 1987 through mid-1995 beef checkoff programs have enhanced the demand for beef.

For example, his analyses concludes that the program has resulted in 2.25 percent higher cattle prices, a $4.5 billion increase in producer revenue, and an estimated rate-of-return of $5.70 for every checkoff dollar invested during the 1987 to mid-1995 period.

Thursday, November 8, 2001

Checkoff
Annual Report
Whole Dollar
Beef Act
Beef Order
Organization
Leadership
Committees
Newsroom
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Job Opportunities

Facts About Checkoffs

Your guide to understanding national commodity promotion and research programs.

Prepared by the National Commodity Checkoff Boards and Councils

Straight answers to the most frequently asked questions about national checkoff programs.

What is a checkoff program?

A checkoff is an industry-funded generic marketing and research program designed to increase domestic and/or international demand for an agricultural commodity. This can be done through promotion, research and new product development, and a variety of other marketing tools. These programs are similar to businesses funded by shareholders (producers, processors, handlers, importers, etc.) with a board of directors that is accountable to the shareholders.

Who pays for the checkoff?

Each checkoff program is supported entirely by its funders. NO TAXPAYER OR GOVERNMENT FUNDS ARE INVOLVED. Contribution rates vary throughout the different checkoffs, but they are always based on a percentage of net sales or assessed at a set rate per production unit. Each checkoff program participant contributes at the same rate, no matter where his or her operation is located.

How do checkoffs benefit farmers, producers, processors, handlers or importers?

The fundamental goal of every checkoff program is to increase commodity demand, thereby increasing the potential long-term economic growth of all sectors of the industry.

Do checkoffs benefit consumers?

Consumers benefit from checkoffs in two ways:

1. Product information to help make informed choices
2. Continual research to create new and improved products that meet consumer quality, safety and nutritional expectations

Who operates a checkoff?

A checkoff is directed by its funders and managed by a professional staff. Funders are responsible for allocating funds and approving business plans and programs. As in any business, professional staffs and contractors are accountable to their boards to meet performance-based goals.

Checkoffs educate and inform key audiences and lead to product innovations and better choices.

PLAINTIFF'S EXHIBIT 71

Do checkoff programs receive government assistance?

No. Checkoffs are funded entirely by their respective industries, NOT by taxpayers or government agencies. Checkoff programs operate much like corporate businesses, with oversight by the federal government to ensure program accountability. In fact, checkoff programs reimburse the U.S. Department of Agriculture (USDA) for its oversight responsibilities.

Which government agency oversees the checkoffs?

All checkoff programs are overseen by the USDA's Agricultural Marketing Service to ensure the programs operate within mandated rules of compliance outlined in its Congressional Act & Order that governs all checkoff operations.

Who started checkoffs?

Checkoff programs are assessments brought into existence by the industry supporting them and made mandatory through an act of Congress. Checkoff program funders retain the right to vote them out of existence.

What was the first checkoff?

The first promotion program was created under the Wool Act in 1954. Twelve other national checkoff programs are now operating under federal legislation.

Are all checkoff programs the same?

Yes and no. All checkoff programs do have a similar goal and purpose – to increase commodity demand and long-term economic growth for the industry. But they all accomplish this in different ways that are suited to the special market structure of each commodity and the desires of their respective boards.

Checkoffs are directed and fully funded by their respective industries, to stimulate demand and strengthen industries.

Any more questions?

For more information about individual checkoffs, contact any one of the national checkoff programs listed below:

AMERICAN EGG BOARD
www.aeb.org – (847) 296-7043

CATTLEMEN'S BEEF BOARD
www.beefboard.org – (303) 220-9890

COTTON BOARD
www.cottonboard.org – (901) 683-2500

NATIONAL HONEY BOARD
www.nhb.org – (800) 553-7162

MUSHROOM COUNCIL
www.mushroomcouncil.com – (925) 556-5970

NATIONAL DAIRY RESEARCH AND PROMOTION BOARD
www.dairyinfo.com – (847) 803-2000

NATIONAL FLUID MILK PROCESSOR PROMOTION BOARD
www.dairyinfo.com – (847) 803-2000

NATIONAL PORK BOARD
www.porkboard.org – (515) 223-2620

NATIONAL POTATO PROMOTION BOARD
(303) 369-7783

NATIONAL WATERMELON PROMOTION BOARD
www.watermelon.org – (407) 895-5100

POPCORN BOARD
www.popcorn.org – (877) POPALOT

UNITED SOYBEAN BOARD
www.unitedsoybean.org – (800) 989-USB1

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E-mail questions and comments to beefboard@beef.org.

RESPONSIBILITIES OF BEEF BOARD EXECUTIVE COMMITTEE

Responsibilities of Beef Board Executive Committee

Accountability:

- The Executive Committee is held accountable to the Beef Board, producers, USDA and Congress, and placed in a position of trust and confidence to make decisions necessary to administer the terms and provisions of the Act and Order in the general interests of the beef industry, under the direction of the Board and within the guidelines and policies established and approved by the Board.

- The Executive Committee is held accountable to the Beef Board, producers, USDA and Congress for the full $1 per-head checkoff, including the 50 cents retained by qualified state beef councils (QSBCs).

- The Executive Committee is held accountable to the Beef Board, producers, USDA and Congress to ensure that all decisions regarding the allocation, expenditure and governance of checkoff dollars are made in the general interests of the beef industry, and not for the benefit of any particular organization. As a result, the Executive Committee reviews all Operating Committee actions to ensure they are consistent with the Beef Industry Long Range Plan and do not reflect undue influence from a contracting organization.

Compliance:

- On behalf of the Beef Board, the Executive Committee oversees collection efforts of the Beef Board and qualified state beef councils (QSBCs) to ensure national, uniform collection of the $1 per-head checkoff.

- On behalf of the Beef Board, the Executive Committee ensures that checkoff expenditures by QSBCs remain within the parameters of the Act, the Order, and the Beef Board's Guidelines in order to meet the requirements for continued certification. The Executive Committee monitors QSBCs' use of checkoff dollars by requiring each QSBC to submit an annual marketing plan and an annual financial report audited by an independent certified public accountant.

  * *However, the Beef Board and Executive Committee have never taken nor do they intend to take the position of dictating to states how to spend the 50 cents QSBCs retain from each dollar collected.*

Business:

- Acting on behalf of the Beef Board, the Executive Committee conducts general business of the Board between meetings of the full Board, and establishes (subject to full Board approval) policies and guidelines necessary to administer the Act and Order.

PLAINTIFF'S EXHIBIT 81

RESPONSIBILITIES OF QUALIFIED STATE BEEF COUNCILS

Responsibilities Common to Qualified State Beef Councils

Accountability:

- QSBCs are held accountable to the Beef Board, producers, USDA and Congress for adhering to the terms and provisions of the Act and the Order.

Compliance:

- QSBCs are responsible for collecting the $1 per-head checkoff in their respective states, and for ensuring a collection compliance system is in place to uniformly collect the dollar.

Marketing Plans:

- Annually, each QSBC must submit to the Beef Board a marketing plan for investing checkoff dollars in state programs that are within the parameters of the Act, the Order, and the Beef Board's guidelines.

Audited Financial Reports:

- Annually, each QSBC must submit to the Beef Board financial statements audited by a certified public accountant.

Producer Communications:

- Since they are closest to the grassroots level and constantly involved in producer communications activities, QSBCs are encouraged to provide positive and negative feedback to the Beef Board regarding producers' attitudes of the nation-wide checkoff program, industry needs and priorities.

Input:

- QSBCs are kept informed about Beef Board activities, plans and issues, in order that they may provide input responding to concerns and attitudes expressed by grassroots producers, and assist the Beef Board in achieving industry consensus.

Budget Development and Approval Process

PLAINTIFF'S EXHIBIT 82

Process for Annual Budgets and Budget Amendments

1. Strategic priorities are developed and ranked by committee, then ranked across committees by committee and group chairs and vice-chairs in accordance with the Long-Range Plan. *(Jan. – Mar.)*

2. The Joint Industry Budget Committee meets with the group chairs and vice-chairs to develop a budget recommendation based on strategic priorities. NCBA's total budget takes into account CBB's projected revenues, SBC investments, dues and other non-checkoff funding sources. The NCBA Board of Directors reviews and approves the final industry budget recommendation at its summer meeting. Budget amendments are approved at the annual meeting. *(April – July)*

3. The recommended CBB budget is sent to the Operating Committee (OC) for approval. After approval by the OC, the CBB budget recommendation is sent to the full Beef Board for approval. Finally, the CBB budget must also be approved by USDA. *(April – July)*

4. The OC uses the approved budget to fund authorization requests (projects). If the budget is not approved, then the budget process starts again with the Joint Industry Budget Committee. *(July – Sept.)*

5. CBB's annual budget allocates CBB's projected revenues and is presented to CBB for approval at the summer meeting. Any revenue surplus at the end of the fiscal year is added to the amount by which actual administrative expenses and completed project expenses were below budget. The resulting amount is then available for a budget amendment to be considered at the winter meeting. *(Sept. – Jan.)*

Process for "Dynamic" Budget Amendments (used to reallocate FROE funds)

1. As projects are completed, Final Reports of Expenditure (FROEs) are filed with CBB. Any funds left unspent from projects completed under budget (FROE funds) are moved to CBB's unappropriated fund balance. Rather than wait until year end to put those funds to work, the Joint Industry Budget Committee determines that amounts in the unappropriated fund balance should be allocated to budget components to better address current strategic priorities.

2. The Joint Industry Budget Committee develops a proposed budget amendment that allocates funds to CBB budget components.

3. The OC is asked to approve the recommended budget amendment. This can be accomplished at a regularly scheduled meeting or via conference call.

4. The OC approved budget recommendation is sent to all CBB members for approval via mail ballot.

5. The OC may approve projects based on the amended budget.

Variation: If funds need to be allocated immediately to fund time critical projects, the OC can approve the budget amendment (step 3) and approve projects for funding (step 5) contingent upon subsequent approval of the proposed budget amendment by CBB and USDA.

Approved 3-18-98

Annual Beef Industry Planning Cycle

FIDUCIARY RESPONSIBILITIES

Beef Board members occupy a position of trust and confidence. As a result, they have a "fiduciary" relationship to the Beef Board.

- A "fiduciary" is a person who is required to act in scrupulously good faith, and primarily in the interest of another.

- Members of the Beef Board must act primarily in the general interests of the beef industry and not in his/her own interest or that of industry segments.

When a member has personal interest - - - financial or otherwise - - - in a matter being considered by the Board, most state laws require that he/she may not vote on the question. Even if a Board member is legally permitted to vote in such a situation, it is usually sensible for him/her to abstain, so that actions of the Board cannot be tainted by the appearances of impropriety or self-interest.

So long as the members conduct the business of the Beef Board in accordance with their fiduciary responsibilities, they remain free from personal liability, even if the Beef Board incurs financial or other harm through their poor judgment.

Members who exercise honest discretion with no showing of any conflict of interest, and within the powers of the Board, are protected from liability under the so-called "business judgment rule." However, if members commit acts of dishonesty or willful misconduct with the result that the Board suffers a loss, they can be held personally liable. They are bound to care for Board property and conduct and manage its affairs in good faith, and for a violation of these duties, resulting in waste or loss of Board assets, they will be held accountable.

FIDUCIARY RESPONSIBILITY AND LIABILITY OF BOARD MEMBERS

The Beef Board operates through the direction of Board members. The role of a Beef Board member encompasses several important powers and responsibilities.

The primary responsibility of Board members is to guide the planning and budgeting, implementation and evaluation of checkoff programs. Conduct of programs and investments of checkoff dollars are controlled through the actions of Board members.

Powers of the Board are set forth in the Beef Promotion and Research Act and Board members are responsible for carrying out the intent of Congress established in the Act. Therefore, responsibilities of Board members cannot be treated casually. Members must conscientiously use their powers in good faith to benefit general interests of the beef industry, and not merely for the interests of industry segments or a few Board members.

The role of a Board member is more than merely an honorary position. The law requires active involvement and participation of Board members in the life and decision-making process of the organization. Anything less fails to properly serve the Beef Board, but can also leave the Board member exposed to potentially significant personal liability and public embarrassment.

Source: Wayne Watkinson – Legal Counsel

PLAINTIFF'S EXHIBIT 83

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DISTRICT

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S INC., ET AL.,
INTERVENER-DEFENDANTS.

DECLARATION OF BARRY CARPENTER

I, Barry Carpenter, hereby make the following declaration with respect to the above captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am Deputy Administrator of the Livestock and Seed Program of the Agricultural Marketing Service ("AMS") of the U.S. Department of Agriculture ("USDA"). I have worked for the USDA since 1970 and have held my current position since 1993.

3. My duties include implementation of the Beef Promotion and Research Act ("Act") and the Beef Pro-

motion and Research Order ("Order"), and oversight of the Cattlemen's Beef Promotion and Research Board ("Beef Board" or "Board"). I am also familiar with many of the other commodity promotion orders implemented by USDA, especially those relating to soybeans and pork.

4. USDA, acting through AMS, exercises careful oversight over all funds spent by the Beef Board. This oversight includes final approval authority over every checkoff dollar spent by the Board, as well as active participation in the developmental process of all the Board's checkoff-funded advertising, promotion, research, consumer information, and industry information projects. I am the individual responsible for oversight of, as well as for the supervision of other AMS employees who oversee, all actions and decisions made by the Beef Board pursuant to the Secretary's delegation of authority. *See* 7 C.F.R. § 2.79(a)(8)(xxxii); 57 Fed. Reg. 20 (Jan. 23, 1992).

5. All checkoff-funded Beef Board projects and the full Beef Board budget undergo a lengthy developmental process before the Board submits them to USDA for final approval. USDA officials provide input and advice at every stage of project and budget development–from gemination to final approval.

6. Many ideas for promotional projects are first aired at Advisory Committee meetings, which are held twice a year, are open to the public (as are all of the meetings described below), and are attended by members of the Beef Board and members of the Federation of Qualified State Beef Councils ("Federation"). These meetings are run by statutorily - prescribed industry contractors, with whom the Beef Board contracts to develop and implement checkoff-funded projects, and

are designed to solicit public input on funding priorities and program goals. The Advisory Committee also recommends budgetary priorities for the Beef Board.

7. Ralph Tapp, Chief, Marketing Program Branch, Livestock and Seed Program, AMS, and/or I attend all Advisory Committee meetings, stopping in on the various simultaneous sessions being held. We participate actively in these meetings.

8. Based in part on the priorities and ideas solicited at Advisory Committee meetings, industry contractors formulate proposed checkoff-funded projects, including advertising, promotion, research, consumer information, and industry information projects. Working with Beef Board guidance, the contractors prepare formal Authorization Requests ("ARs"), which document planned projects and their budgets, for submission to the Beef Promotion Operating Committee ("Operating Committee").

9. The Operating Committee, which consists of ten members of the Beef Board and ten elected members of the board of directors of a qualified state beef council, meets several times each year. It generates and approves annual budget recommendations for the Beef Board and reviews each submitted AR. The Operating Committee must approve the Board's annual budget recommendation and each AR, by a two-thirds vote of its members, before they are submitted to the Beef Board and USDA for further review and approval.

10. Mr. Tapp and/or I attend all Operating Committee meetings as active participants. Mr. Tapp and I review proposed annual budgets and ARs before attending, and provide comments and feedback to

members of the Operating Committee on the proposals and on any other issues that arise.

11. If approved by the Operating Committee, the annual Beef Board budget is submitted to the full Beef Board for review and approval by a majority vote.

12. Mr. Tapp and/or I also attend all full Beef Board meetings, which are held twice each year.

13. ARs approved by the Operating Committee are submitted to the Beef Board Executive Committee ("Executive Committee") for review and ratification. The Executive Committee oversees the day-to-day operations of the Board and implements its policies.

14. Mr. Tapp and/or I attend these meetings and actively participate in all discussions, providing comments and feedback to members of the Executive Committee on proposed ARs and general budget and program direction goals.

15. Once the full Beef Board approves its annual budget, and the Executive Committee ratifies an AR, each is submitted to USDA for final approval. Mr. Tapp and members of his staff in the AMS Marketing Program Branch first review the final proposed budget or project for compliance with the Act and Order. If problems are identified at this stage, Marketing Program Branch staff work with the Beef Board to make any necessary changes. The annual budget or AR will not be approved until the changes are made.

16. Once the AMS Marketing Program Branch reviews and approves the Beef Board's annual budget or AR, it is sent to me for final approval. I raise any and all remaining concerns I have about the budget or a specific project with the Beef Board at this time and

will not approve them until all necessary changes are made.

17. While USDA does not hesitate to exercise its veto authority when materials and budgets are sent for final approval, it is rare for problems to remain at that stage. This is because of the extensive input Mr. Tapp and I have in all budgetary and product development at each stage of review, as well as the open lines of communication we maintain between Beef Board and USDA staff.

18. In addition to approving project proposals via the AR review process, USDA requires the Beef Board to submit all of its checkoff-funded advertising and promotional materials for AMS review and approval prior to their implementation. The Beef Board often consults with AMS as to the propriety of a particular proposed advertisement during the drafting stage, as well. A true and accurate copy of one instance in which USDA mandated a change in a proposed advertisement is attached hereto as Exhibit 1.

19. USDA also requires the Beef Board to submit all of its producer communication materials for AMS review and approval prior to their implementation. In addition, the Beef Board often consults with AMS as to the propriety of a particular proposed communication during the drafting stage. A true and accurate copy of one instance in which USDA mandated a change in a proposed producer communication is attached hereto as Exhibit 2. The change was intended to ensure that the communication avoided the implication that the checkoff can guarantee profits by changing the phrase "means increasing profits" to "can mean increased profits."

20. USDA requires that the Beef Board oversee all checkoff spending by qualified state beef councils Pursuant to its oversight function, the Beef Board requires that each qualified state beef council submit its marketing plan and budget to the Board prior to each fiscal year for review and approval and that each state council submit an audited review at the end of each fiscal year. The Beef Board raises any concerns it has upon review of the material with AMS.

21. USDA reviews all qualified state beef council checkoff-funded advertising and promotional materials for branded products prior to their publication. If a problem with an advertisement or communication is identified, USDA does not approve the material until necessary changes are made.

22. USDA reviews other checkoff-funded promotional materials prepared or funded by qualified state beef councils on a post-release basis. If a problem with an advertisement or communication is identified, USDA orders it withdrawn from publication until necessary changes are made.

23. USDA reviews every contract the Operating Committee or Beef Board enters into for checkoff-funded services before it is signed and randomly spot checks subcontracts entered into by Beef Board contractors for checkoff-funded services. USDA rejects any contractor or proposed contract that fails to meet criteria as established in the Act.

24. USDA pre-approves any testimony provided to or appearances made by Beef Board employees or members before Congress on behalf of the Beef Board.

25. USDA also participates in an advisory capacity in the Board's hiring decisions and maintains final

approval authority for the selected candidate for the Beef Board's Chief Operating Officer.

26. In addition to the continuous oversight described above, USDA determines the composition of the Beef Board itself. USDA certifies those organizations that are eligible to nominate Beef Board members based on the requirements set forth in the Act. In exercise of this authority, USDA has rejected the applications of organizations that do not meet the statutory criteria, and has in the past decertified at least one such organization that had previously been certified.

27. USDA requires these organizations to submit at least two nominees for each open seat on the Beef Board, and often receives more than two nominees.

28. Pursuant to its statutory authority, USDA has removed a member of the Beef Board in the past by seeking and accepting that person's resignation.

29. All checkoff assessments paid by importers are collected by the U.S. Customs Service ("Customs Service"), which provides them to USDA. USDA, in turn, provides these funds to the Beef Board.

30. On average, graded beef sells for approximately an additional $15 per hundredweight compared to ungraded beef. *See* National Weekly Direct Slaughter Cattle—Premiums and Discounts Report, <*http://www.ams.usda.gov/mnreports/lm_ct155.txt*>. Grading effectively sets the price of livestock sold, as most livestock prices are based either on the actual grade of the meat, or the anticipated grade at the time of sale.

31. Mandatory price reporting under the Livestock Mandatory Reporting Act of 1999 also serves to effectively establish livestock prices in the marketplace as many sale contracts are tied to the reported prices.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of October, 2001.

/s/ BARRY L. CARPENTER
BARRY L. CARPENTER

USDA

United States Department of Agriculture
Agricultural Marketing Service
P.O. Box 96456
Washington, DC 20090-6456

June 4, 1997

Mr. Monte Reese
Chief Executive Officer
Cattlemen's Beef Promotion
and Research Board
Post Office Box 3316
Englewood, Colorado 80155

Dear Monte:

We have reviewed and are approving the proposed TV advertisement entitled "Cindy" depicting a dream-like scene in which a rotisserie chicken expresses a desire to be a steak. We also reviewed the proposed radio advertisement entitled "Tastes Like Chicken" which we are not approving as submitted.

Sincerely,

/s/ Robert L. Leverette
(for) Barry L. Carpenter
Director
Livestock and Seed Division

USDA FAXED

United States Department of Agriculture

Producer Communications

Cattlemen's Beef Promotion and Research Board

SUBJECT: Five Radio Scripts—State Beef Councils

Date Received: 12/10/99 Time: 5:25 p.m.

Date Approved: 12/13/99 Time: 2 p.m.

Ralph L. Tapp notified Board's contact Sharyl Phipps, NCBA by:

___ Phone _X_ Fax ___ e-mail

We Disapproved: / / Time: ___

_____ notified Board's contact _____ by:

___ Phone ___ Fax ___ e-mail

Date Advised Board More Time Needed: / / Time: _

_____ notified Board's contact _____ by:

___ Phone ___ Fax ___ e-mail

NOTES: As discussed modify #5 to avoid implying that the checkoff can "guarantee" profits by replacing "means increasing profits" with something like: "can mean increased profit

Reviewed and Approved by: Ralph L. Tapp

Date: 12/13/99

ANIMALS BROUGHT TO YOU BY THE NEBRASKA BEEF PRODUCERS THROUGH THEIR BEEF CHECK-OFF.

RADIO RELEASE #5
INTERNATIONAL MARKETING
30 SECONDS

I'M (NAME), A (TYPE OF OPERATION) FROM (HOMETOWN), DID YOU KNOW THAT OUR CHECK-OFF DOLLARS ARE HELPING PROMOTE U.S BEEF EXPORTS IN MORE THAN 50 FOREIGN COUNTRIES? LAST YEAR FOR THE FIRST TIME EVER MORE THAN 1 MILLION METRIC TONS OF U.S. BEEF WAS EXPORTED. THAT'S FOUR TIMES MORE THAN WHEN THE CHECKOFF BEGAN IN 1986. INCREASED EXPORTS EQUALS MORE DEMAND. AND THAT ~~MEANS INCREASING~~ CAN MEAN INCREASED PROFITS FOR U.S. PRODUCERS. BROUGHT TO YOU BY THE NEBRASKA BEEF PRODUCERS AND THEIR BEEF CHECKOFF.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DISTRICT

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION,
ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S INC., ET AL.,
INTERVENOR-DEFENDANTS

SECOND SUPPLEMENTAL DECLARATION OF BARRY CARPENTER

I, Barry Carpenter, hereby make the following declaration with respect to the above captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am Deputy Administrator of the Livestock and Seed Program of the Agricultural Marketing Service ("AMS") of the U.S. Department of Agriculture ("USDA" or "Department"). I have worked for the USDA since 1970 and have held my current position since 1993.

3. My duties include implementation of the Beef Promotion and Research Act ("Act") and the Beef Promotion and Research Order ("Order"), and oversight of the Cattlemen's Beef Promotion and Research Board ("Beef Board" or "Board"). I am also familiar with many of the other commodity promotion orders implemented by USDA, especially those relating to soybeans and pork.

4. I have reviewed Plaintiff's Response to Defendants' Statement of Material Facts ("Plaintiffs' Response"), wherein Plaintiffs dispute that AMS exercises careful oversight over the Beef Board's activities and expenditures and that Ralph Tabb and/or I, on behalf of AMS, actively participate in the developmental process for all of the Board's checkoff-funded projects. I am providing this Second Supplemental Declaration to further describe the nature and extent of USDA's oversight over the Beef Board, as well as other relevant facts.

5. I, or someone I designate, participate in an orientation session for all new Beef Board members each year. At this orientation, I explain the Beef Board members' responsibilities, the Department's oversight and approval role, the regulations that govern the Board's operation and that those regulations can only be changed pursuant to notice and comment. In the future, I will also be conducting such an orientation session for new Operating Committee members.

6. In addition, I am regularly-scheduled speaker at each full Beef Board meeting. I use this opportunity to remind Beef Board members of their fiduciary obligations under the Act and Order and to provide USDA's input regarding whatever matters I deem appropriate.

7. I have reviewed the minutes of various Beef Board committee meetings attached as Exhibit 69 to Plaintiffs' Response, and am generally familiar with the nature of Beef Board minutes. The minutes attached as Exhibit 69 to Plaintiffs' Response, like other Beef Board committee minutes generally, do not record specific comments made by those in attendance with regard to particular agenda items, but rather merely record actions taken at the meeting. Thus, the minutes describe the topic discussed and then indicate "discussion" when a discussion was held. *See, e.g.*, Minutes of Executive Committee Meeting, Aug. 2, 2000, at 3, attached as part of Exhibit 69 to Plaintiffs' Response.

8. I do, in fact, actively participate in those meetings that I attend. That participation takes various forms.

9. I prepare for the meetings by reviewing any material that is provided in advance of the meetings. If I identify any issue that raises serious concern, I will phone the relevant individual to raise and discuss my concern. I usually call the Board's Chief Operating Officer or Chairman in such circumstances.

10. At the various meetings I attend, I listen carefully to the discussion and I speak when I deem it necessary. For example, I estimate that at the last Executive Committee meeting I attended I spoke approximately half-a-dozen times.

11. I also often raise my concerns with Committee Members during breaks in the meetings. In this way, my concerns are often aired at the meetings by others, without my having to directly address an issue while the meeting is in session. If an issue about which I have a concern is raised by others, and the discussion and

decision regarding that issue are satisfactory to me, I do not feel the need to further raise the issue, and I therefore remain silent on the matter. My subordinate, Ralph Tapp, operates in a similar manner.

12. I generally express my views, either before or during a meeting, when a proposed course of action raises concerns with respect to the Act or the Order. I act to ensure that all of the Board's activities are in accordance with the Act and the Order. For example, several years ago a proposed Authorization Request ("AR") for a checkoff-funded producer communication piece, as proposed, included non-checkoff-funded, NCBA activities in its description of Beef Board accomplishments. Upon seeing this, I ensured that proposed piece did not reference any non-checkoff-funded activities even before the AR reached the Operating Committee.

13. The above example also demonstrates how my involvement is often behind the scenes and is not limited to participating in the Board's various meetings. As a result of AMS' persistent involvement in the process, many potentially problematic issues never arise in committee meetings.

14. I also express my views when a matter relates more specifically to the interests of the Department. Thus, for example, I have encouraged the Board —through my participation in various committees and my discussions with Board personnel—to:

a. fund food safety research relating to BSE ("mad cow" disease), because these were areas of food safety research that the Department was concerned about;

b. fund projects regarding "traceability"—the ability to preserve the identity of meat from calf to plate—because the Department was interested in encouraging such research;

c. fund consumer information projects regarding safe food handling procedures because of the Department's interest in the broad dissemination of such information in light of concerns raised by E.coli 0157:H7; and

d. continue to provide extensive funding for the Meat Export Federation's promotion of U.S. beef abroad, and particularly in Japan, because the Department has strong interest in expending export markets for U.S. beef and other commodities.

15. I also let the Board know when I believe the Board's processes need improvement. For example, I recently voiced concern that the AR review and approval process might appear to outsiders to be insufficiently competitive, in light of the Operating Committee's approval of most submitted AR's. While I know from my participation in the process that each AR is assessed, discussed and debated, I believed that outsiders might perceive the process as less thorough than it was. As a result of my comments, Beef Board Chairman Dan Hammond convened a Commission to address this issue and recommend improvements to the AR review and approval process. *See* Exhibit 1 hereto (referencing my concerns and the Commission established).

16. The above example also demonstrates why AMS rarely has to invoke its ultimate authority to direct or prohibit the Beef Board from acting. As a general

matter, the suggestions that I make are accepted and acted upon to my satisfaction, without my having to invoke any regulatory authority.

17. In participating in Operating Committee and other Beef Board meetings, I am aware of my ultimate authority and responsibility to approve all Beef Board projects and expenditures. In order to preserve this authority, and the ability to more thoroughly review any matters agreed upon by the Operating Committee or other Beef Board committees, I restrain my participation in these meetings, so that committee members do not have the impression that by virtue of my participation the Department has somehow pre-judged and approved the actions taken.

18. I also regularly participate in international meetings and conferences in my official capacity.

19. Through my involvement in these activities, I am aware that USDA beef graders are internationally recognized and that "choice" and "prime" grades are the most recognized marks of quality beef in the world.

20. Japanese purchasers, who are the largest importers of American beef, generally require beef to be graded "prime," "choice," or "select." Similarly, in Central and Eastern Europe, the American Beef Club project, funded in part by checkoff dollars, requires participating restaurants to use U.S. "prime" and "choice" beef, and has led to increased demand for U.S. beef in those regions.

21. The American grading system is so widely recognized, and provides American graded beef such a competitive advantage, that other countries model their grading systems on the American model. For example, Canada recently changed its grading system and grade

names to mimic the American system. Similarly, China recently selected the American system as a model in developing its beef grading system.

22. The effect of this widespread recognition of American grades is to increase demand for American beef in the international marketplace, thereby increasing value to U.S. producers and creating additional incentives for American producers to have their meat graded.

23. In my official capacity, I am also in charge of the Department's purchase of certain surplus foods under its Section 32 authority (7 U.S.C. § 612c). These surplus purchases are used in federal feeding programs, primarily the school lunch program. The purpose of such purchases is to maintain a stable market in agricultural commodities.

24. Beef forms a substantial part of the Department's surplus foods purchases. During school year 2000-2001, the Department purchased 122.90 million pounds of beef with a value of $182.32 million. During the same year, the Department purchased 5.76 million pounds of canned beef with a value of $7.89 million and 9.72 million pounds of canned beef stew with a value of $7.49 million. Summaries for these purchases and for prior years can be found at <http://www.ams.usda.gov/lsg/cp/beef/beeffyp.htm>.

25. AMS is also responsible for overseeing the Livestock Mandatory Price Reporting System established pursuant to the Livestock Mandatory Reporting Act of 1999 ("LMRA"), 7 U.S.C. §§ 1635-1636h. As stated in my prior declaration, mandatory price reporting under the LMRA serves to effectively establish livestock prices in the marketplace as many sale contracts are

tied to the reported prices. As further indication of the effect that LMRA-mandated reporting has on the marketplace, USDA has estimated that erroneous price reporting over a 29-day period in April-May 2001 resulted in $15 million to $25 million in lost sale revenue to cattle producers. LMPR Review Team, Livestock Mandatory Price Reporting System: Report to the Secretary of Agriculture, July 2, 2001, at iii, 37, available at <http://www.usda.gov/oce/mp-report/mpr-report.pdf>, attached hereto as Exhibit 2. The importance of such price reporting to the beef and cattle market is further indicated by the fact that the Chicago Mercantile Exchange relies on USDA's price reports to adjust the value of cattle which do not meet contract specifications. See id. at 26.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of December, 2001.

/s/ BARRY L. CARPENTER
BARRY CARPENTER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DISTRICT

No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S INC., ET AL.,
INTERVENOR-DEFENDANTS.

DECLARATION OF MONTE REESE

I, Monte Reese, hereby make the following declaration with respect to the above-captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am the Chief Operating Officer ("C.O.O.") of the Cattlemen's Beef Promotion and Research Board ("Beef Board" or "Board"). I have been employed by the Board since November 1989, and have been C.O.O. or in a comparable position since August 1990. I am in charge of the Board's day-to-day operations. In this position, I work closely with the Agricultural Marketing Service ("AMS") of the U.S. Department of

Agriculture ("USDA"), which exercises continuing oversight over all activities of and spending by the Beef Board.

3. The Board is responsible for overseeing the implementation of the Beef Promotion and Research Act ("Act"). The Board is funded wholly through assessments on the sale and importation of cattle.

4. In fiscal year ("FY") 2000, over $87 million of assessments were collected under the Act.

5. The Board, in conjunction with the Beef Promotion Operating Committee, develops and implements promotion, research, consumer information and industry information plans and projects, all subject to the approval of the Secretary of Agriculture. Some of these projects include the promotion of beef through advertising (including the "Beef, It's What's For Dinner" campaign); food safety programs that conduct research on, an disseminate information about, foodbourne pathogens such as *E. Coli*, Salmonella, and Listeria, as well as the proper handling of beef products; nutrition and health education programs, which provide thousands of children and adults with information regarding dietary needs and the role of beef in a healthy diet; the provision of information regarding BSE ("mad cow disease") and Foot and Mouth Disease; and a host of other activities. Examples of some of these materials are attached as exhibits A through D to the Joint Statement of Stipulated Facts, submitted herewith.

6. The Board's total expenditures on food safety programs since 1987 have exceeded $8 million, and the total expenditures on nutrition and health education have exceeded $24 million.

7. The Board reviews all subcontracts that its contractors enter into for checkoff-funded services, before they do so, and refers questions to USDA as necessary.

8. Although qualified state beef councils are entitled to retain 50 cents of every dollar collected in assessments, many state councils in fact contribute significant portions of that money to support the national program. In FY 2000, the qualified state beef councils provided $13,650,351, or 35 percent of their portion of the assessments, for this purpose. Five states do not have qualified state beef councils, and in those states the Board collects the entire assessments.

9. The Beef Board oversees all checkoff spending by qualified state beef councils. Pursuant to its oversight function, the Board requires that each qualified state beef council submit its marketing plan and budget to the Board prior to each fiscal year for review and approval and that each state council submit an audited review at the end of each fiscal year. These materials are passed on to USDA at its request and are discussed at Beef Board Executive Committee meetings, which are attended by a USDA representative, usually either Barry Carpenter, Deputy Administrator, Livestock and Seed Program, AMS, or Ralph Tapp, Chief, Marketing Programs Branch, Livestock and Seed Program, AMS.

10. USDA regularly forwards to the Beef Board requests for information it receives from members of the public, pursuant to the Freedom of Information Act, 5 U.S.C. § 522. The Board has received and processed at least forty such requests for information from the Livestock Marketing Association (LMA), and, pursuant to its statutory duty, has searched its files and produced all non-exempt, responsive records to LMA.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of October, 2001.

/s/ MONTE REESE
MONTE REESE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DISTRICT

No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S INC., ET AL.,
INTERVENOR-DEFENDANTS.

SUPPLEMENTAL DECLARATION OF MONTE REESE

I, Monte Reese, hereby make the following declaration with respect to the above-captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am the Chief Operating Officer of the Cattlemen's Beef Promotion and Research Board ("Beef Board" or "Board") and work closely with the Agricultural Marketing Service ("AMS") of the U.S. Department of Agriculture ("USDA"), which exercises continuing oversight over all activities of and spending by the Beef Board.

3. While the Board's domestic promotion programs make no distinction between domestic and imported beef, the Board has never specifically promoted imported beef as indistinguishable from domestic beef. The Board's foreign marketing projects emphasize and promote the safety and wholesomeness of U.S. beef.

4. To the best of my recollection, none of the plaintiffs, and no representative or member of the Livestock Marketing Association ("LMA") or the Western Organization of Resource Councils ("WORC"), has ever complained to the Beef Board about the Board's alleged failure to promote U.S. beef as healthier, tastier, or of higher quality than imported beef, or has ever asked the Board to convey such a message.

5. Some of the Board's programs of promotion, research, consumer information or industry information are supplemented with appropriated government funds.

6. The National Cattlemen's Beef Association ("NCBA"), through its Federation Division, is one of several "established national non-profit industry-governed organization[s]," 7 U.S.C. § 2904(6), with whom the Board has contracted for checkoff-funded services. In recent years, other contractors have included the U.S. Meat Export Federation and the American National Cattlewomen. While NCBA recently has been the Board's Promotion Operating Committee and Beef Board for review. The Board in no way dictates or controls the number of proposals each industry-governed organization may submit.

7. While the relationship between the Beef Board and NCBA has resulted in some confusion, I have not and would not characterize such confusion as "substantial." Some of the alleged "confusion" was caused by an LMA board member who persisted in referring to Beef Board members as NCBA spokespersons, notwithstanding numerous attempts on the Beef Board's part to rectify this misinformation.

8. Because all initial ideas and decisions about how the Beef Board spends checkoff funds are made by cattle producers, through the lengthy development and approval process explained in Barry Carpenter's declaration of October 18, 2001, I consider the program to be "producer-led." For example, no decision of the Beef Board is implemented without first being approved by cattle producers. I do not believe that this characterization is in any way inconsistent with the extensive oversight USDA provides over all Beef Board activities and spending.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of November 2001.

/s/ MONTE REESE
MONTE REESE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DISTRICT

No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S INC., ET AL.,
INTERVENOR-DEFENDANTS.

SECOND SUPPLEMENTAL DECLARATION OF MONTE REESE

I, Monte Reese, hereby make the following declaration with respect to the above-captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am the Chief Operating Officer of the Cattlemen's Beef Promotion and Research Board ("Beef Board" or "Board") and work closely with the Agricultural Marketing Service ("AMS") of the U.S. Department of Agriculture ("USDA"), which exercises careful and continuing oversight over all activities of and spending by the Beef Board.

3. I have reviewed Plaintiffs' Response to Defendants' Statement of Material Facts ("Plaintiffs' Response"), wherein Plaintiffs dispute that AMS exercises careful oversight over the Beef Board's activities and expenditures and that Ralph Tapp and/or Barry Carpenter, on behalf of AMS, actively participate in the development process for all of the Board's checkoff-funded projects. I am providing this Second Supplemental Declaration to further describe the nature and extent of USDA oversight over the Beef Board, as well as other relevant facts.

4. USDA has final approval authority over every checkoff dollar spent by the Board, and it plays a constant role in the developmental process of all of the Board's checkoff-funded advertising, promotion, research, consumer information, industry information, and producer communication projects.

5. All checkoff-funded Beef Board projects and the full Beef Board budget undergo a lengthy developmental process before the Board submits them to USDA for final approval. USDA officials provide input and advice at every stage of project and budget development–from germination to final approval.

6. Many ideas for promotional projects are first aired at Advisory Committee meetings, which are held at least twice a year, are open to the public (as are all of the meetings described below), and are attended by members of the Beef Board and members of the Federation of Qualified State Beef Councils ("Federation"). These meetings are also attended by statutorily-prescribed industry contractors with whom the Beef Board contracts to develop and implement checkoff-funded projects. The meetings are designed to solicit public input on funding priorities and program goals.

Based on the information they gather, the Advisory Committee recommends budgetary priorities for the Beef Board.

7. Barry Carpenter and/or Ralph Tapp attend Advisory Committee meetings, stopping in on the various sessions that are held. I have personally observed them at these meetings and have seen them interact with members of the Committee, both in the meetings and outside of them. I always speak to Mr. Carpenter and/or Mr. Tapp at these meetings, and when I do, they freely share USDA's positions and guidance on issues affecting the Beef Board and check-off funds.

8. Based in part on the priorities and ideas solicited at Advisory Committee meetings, industry contractors formulate proposed checkoff-funded projects, including advertising, promotion, research, consumer information, and industry information projects. Working with Beef Board guidance, the contractors prepare formal Authorization Requests ("ARs"), which document planned projects and their budgets, for submission to the Beef Promotion Operating Committee ("Operating Committee").

9. The Operating Committee, which consists of ten members of the Beef Board and ten elected members of the board of directors of a qualified state beef council, meets several times each year. It generates and approves annual budget recommendations for the Beef Board and reviews each submitted AR. The Operating Committee must approve the Board's annual budget recommendation and each AR, by a two-thirds vote of its members, before they are submitted to the Beef Board and USDA for further review and approval.

10. Mr. Carpenter and/or Mr. Tapp attend all Operating Committee meetings as active participants. Since I started at the Beef Board, I have attended every Operating Committee meeting and have witnessed both men provide comments and feedback to members of the Committee when they deem such comments necessary, both in the formal meetings and outside of them. I always speak to Mr. Carpenter and/or Mr. Tapp at these meetings, and when I do, they freely share USDA's positions and guidance on issues affecting the Beef Board and check-off funds.

11. I am familiar with the minutes kept at Operating Committee meetings. Those minutes reflect actions taken by the Committee at those meetings, not comments made by any individual participant. As a result, neither Mr. Carpenter's nor Mr. Tapp's comments would be reflected therein. Attached is a copy of the rules governing Operating Committee meetings, in which Paragraph 14 indicates that "Minutes . . . should contain only what was done, not what was said by the members." Attached at Tab 1.

12. If approved by the Operating Committee, the annual Beef Board budget is submitted to the full Beef Board for review and approval by a majority vote.

13. Mr. Carpenter and/or Mr. Tapp attend all full Beef Board meetings, which are held twice each year. At these meetings, Mr. Carpenter, and in his absence, Mr. Tapp are always given the opportunity to speak from the podium to the full Beef Board on issues of their choosing. In addition, Mr. Carpenter and Mr. Tapp circulate freely, speaking with Beef Board members both in and out of meetings. Again, I speak often with them at these meetings, and they freely

share USDA's positions and guidance on various policy and budgetary issues.

14. I am familiar with the minutes kept at full Beef Board meetings. Those minutes reflect actions taken by the full Board at those meetings, not comments made by any individual participant. This practice is pursuant to Robert's Rules of Order, which the full Beef Board meetings follow, and which specify that minutes "should contain mainly a record of what was *done* at the meeting, not what was *said* by the members" (emphasis in original). The SCOTT, FORESMAN ROBERT'S RULES OF ORDER, (newly revised), § 47, attached hereto at Tab 2. As a result, neither Mr. Carpenter's nor Mr. Tapp's comments would be reflected therein.

15. ARs approved by the Operating Committee are submitted to the Beef Board Executive Committee ("Executive Committee") for review and ratification. The Executive Committee oversees the day-to-day operations of the Board and implements its policies.

16. Mr. Carpenter and/or Mr. Tapp attend these meetings and actively participate in all discussions, providing comments and feedback to members of the Executive Committee on proposed ARs and general budget and program direction goals. I also attend these meetings and personally have witnessed the participation of these two men, both in and out of committee meetings. As with the other meetings they attend, they share with the committee as a whole and with individual members USDA's positions and guidance on checkoff-funded activities and issues.

17. I am familiar with the minutes kept at Executive Committee meetings. Those minutes reflect actions

taken by the Committee at those meetings, not comments made by any individual participant. This practice is pursuant to Robert's Rules of Order, which the Executive Committee meetings follow, and which specify that minutes "should contain mainly a record of what was *done* at the meeting, not what was *said* by the members") (emphasis in original). See Tab 2. As a result, neither Mr. Carpenter's nor Mr. Tapp's comments would be reflected therein.

18. Once the full Beef Board approves its annual budget, or the Executive Committee ratifies an AR, the budget or AR is submitted to USDA for final approval. At this stage, Mr. Tapp and/or Mr. Carpenter may call me at express any remaining concerns they have about the proposed budget or project. All changes they request are made, so that USDA approval may be obtained.

19. The lines of communication between the Beef Board and USDA are wide open, and I speak with AMS regularly both at meetings and during the ordinary course of business. It is not unusual for Mr. Carpenter and/or Mr. Tapp and I to speak several times a day, although at times we may also go a few weeks without connecting by telephone.

20. In addition to providing their usual oversight and advisory functions, AMS officials inform the Board if USDA has a particular policy position that the Board should address. Recent examples of such positions that come to mind include requests for:

a. additional funding for food safety research and industry and consumer information relating to BSE ("mad cow" disease);

b. additional funding for consumer information projects regarding safe food handling procedures, in light of concerns raised by the presence of E.coli 0157:H7 in certain beef products; and

c. additional and extensive funding for the Meat Export Federation's promotion of U.S. beef abroad, and particularly in Japan.

21. Further, the Beef Board regularly corresponds with AMS outside the official approval process in an effort to flag future issues and to ensure that a future request for approval will be granted. An example of such correspondence is attached hereto, at Tab 3. In this instance, I wanted USDA's preliminary approval of the steps the Board would take to ensure the resumption of beef checkoff funding for U.S. Meat Export Federation projects.

22. In addition to approving project proposals via the AR review process, USDA requires that the Beef Board submit all of its checkoff-funded advertising and promotional materials for review and approval prior to implementation. The Beef Board raises with USDA any questions we have about the propriety of a particular proposed advertisement during the drafting stage, as well.

23. USDA also requires the Beef Board to submit all of its producer communication materials for AMS review and approval prior to their implementation. Prior to submission, the Beef Board often consults with AMS as to the propriety of a particular proposed communication during the drafting stage.

24. The Beef Board submits every contract the Operating Committee or Beef Board enters into for checkoff-funded services for review and final approval by USDA. USDA also randomly spot checks subcontracts entered into by Beef Board contractors for checkoff-funded services.

25. No member or employee testifies before Congress on behalf of the Board without prior approval by USDA.

26. USDA participates in an advisory capacity in the Board's hiring decisions and maintains final approval authority for the selected candidate for Chief Operating Officer, the position I currently hold.

27. In addition to the continuous oversight described above, USDA determines the composition of the Beef Board itself. USDA certifies those organizations that are eligible to nominate Beef Board members, based on the requirements set forth in the Act. USDA has rejected the applications of organizations that do not meet the statutory criteria and has in the past decertified at least one such organization that had previously been certified.

28. USDA requires these organizations to submit at least two nominees for each open seat on the Beef Board, and it is my understanding that it often receives more than two nominees.

29. Pursuant to its statutory authority, USDA has removed a member of the Beef Board.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of December, 2001.

/s/ MONTE REESE
MONTE REESE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

&

NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL.,
INTERVENOR-DEFENDANTS

June 27, 2001

DEPOSITION OF MONTE REESE

* * * * *

[52]

Q. The ten-day rule. Okay. What was the percentage that the initial referendum—by what percentage did cattle producers approve?

[53]

A. My recollection is it was between 78 and 79 percent.

* * * * *

[Seal]
Office of Chief Counsel

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

February 19, 1993

Mr. M. Bradley Flynn
Office of the General Counsel
United States Department of Agriculture
Room 2014 - South Building
Washington, DC 20250-1400

Dear Mr. Flynn:

This is in reply to your letter dated January 13, 1993, requesting rulings that the Cattlemen's Beef Promotion and Research Board (hereinafter referred to as "the Board") is exempt from federal income taxation.

Revenue Ruling 87-2, 1987-2 Cumulative Bulletin 18, holds that a trust fund created by a state supreme court to hold amounts advanced to lawyers in the state supreme court to hold amounts advanced to lawyers in the state by their clients is an integral part of the state and not subject to income tax. In arriving at this holding, the ruling reasons that the state court's creation of the fund and its ability to select and remove the fund's governing body, to control the fund's investments and expenditures, to monitor the fund's daily operation, and to abolish the fund indicate that the fund is not an independent entity, but rather is an integral part of the state.

In the present situation, the Board is established pursuant to specific statutory authorization vested in the Secretary of Agriculture. Members of the Boards are appointed by the Secretary of Agriculture from nominations submitted by producers and importers. The Boards' budgets, projects, and contracts with other parties must be approved by the Secretary, and the Board must maintain records for the Secretary's inspection. No funds of the Board may be used to influence any legislation. The Secretary is authorized to conduct a referendum upon the satisfaction of certain conditions for the purpose of determining whether to terminate the order establishing the Board.

The Board is similar to the trust fund in Rev. Rul. 87-2 and therefore is an integral part of the Department of Agriculture. Accordingly, the Board is not subject to federal income taxation.

If you require further information or have any questions concerning this matter, please call the undersigned at (202) 622-3930, or Mr. Adrian Michur at (202) 622-3203.

Sincerely yours,

Assistant Chief Counsel
(Financial Institutions & Products)

By: /s/ WILLIAM E. COPPERSMITH
William E. Coppersmith
Chief, Branch 2